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Supreme Court, U.S.
FILED

No. ____ 99 1038 DEC 17 1999

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IN THE
Supreme Court of the United States

EASTERN ASSOCIATED COAL CORPORATION,
Petitioner,

v.

UNITED MINE WORKERS OF AMERICA, DISTRICT 17;
LOCAL 1503, UNITED MINE WORKERS OF AMERICA,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

RONALD E. MEISBURG
HEENEN, ALTHEN & ROLES
1110 Vermont Ave., N.W.
Suite 400
Washington, D.C. 20005
(202) 887-0800

ANNA M. DAILEY
DONNA C. KELLY
HEENAN, ALTHEN & ROLES
1380 One Valley Square
P.O. Box 2549
Charleston, West Virginia 25329
(304) 342-8960

JOHN G. ROBERTS, JR.*
DAVID G. LEITCH
H. CHRISTOPHER BARTOLOMUCCI
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

* Counsel of Record

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

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QUESTIONS PRESENTED

1. Whether, as the First, Third, Fifth, Eighth, and Eleventh Circuits have held, there is a well defined and dominant public policy that prohibits enforcement of arbitration awards requiring reinstatement to safety sensitive positions of employees who test positive for illegal drugs, or whether, as the Second, Sixth, Ninth, Tenth, and now Fourth Circuits have held, no such policy exists and courts must therefore uphold reinstatement to safety sensitive positions of those who test positive for illegal drugs.

2. Whether, as the Fourth, Ninth, and District of Columbia Circuits have held, an arbitration award should be vacated on public policy grounds only when the award itself violates positive law or requires unlawful conduct by the employer, or whether, as the First, Third, Fifth, Seventh, Eighth, and Eleventh Circuits have held, such an award need not violate positive law to violate public policy—a question on which the Court granted certiorari, but did not reach, in *United Paperworkers International Union* v. *Misco, Inc.*, 484 U.S. 29 (1987).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Eastern Associated Coal Corporation was the plaintiff-appellant below. Respondents the United Mine Workers of America, District 17, and Local 1503 of the United Mine Workers of America, were defendants-appellees below.

Petitioner is wholly owned by Coal Properties Corporation, which is in turn wholly owned by Peabody Holding Company, Inc., which is in turn wholly owned by P&L Coal Holdings Corporation. No publicly held company owns 10 percent or more of petitioner's stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY AND REGULATORY PROVISIONS INVOLVED	2
INTRODUCTION	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT IN THE COURTS OF APPEALS ON THE QUESTION WHETHER PUBLIC POLICY IS VIOLATED BY AN ARBITRAL AWARD ORDERING REINSTATEMENT, TO A SAFETY SENSITIVE POSITION, OF AN EMPLOYEE WHO HAS TESTED POSITIVE FOR ILLEGAL DRUG USE	8
A. The Circuits Are Divided On Reinstatement Of An Employee Who Tests Positive For Illegal Drug Use To A Safety Sensitive Position	8
B. There Is A Well Defined And Dominant Public Policy Against Reinstatement Of Employees Who Test Positive For Illegal Drug Use To Safety Sensitive Positions	17
C. The Issue Is Important And Recurring	20

TABLE OF CONTENTS—Continued

Page

II. THIS COURT SHOULD ALSO ANSWER THE QUESTION ON WHICH IT GRANTED CERTIORARI, BUT DID NOT RESOLVE, IN *MISCO* 22

A. *Misco* Failed To Resolve A Conflict In The Courts Of Appeals Over Whether An Arbitrator's Award Must Violate Positive Law To Violate Public Policy 22

B. The Conflict In The Circuits Over The Question Left Open In *Misco* Has Grown Worse.. 24

CONCLUSION 30

APPENDICES

Appendix A:

Opinion of the United States Court of Appeals for the Fourth Circuit (August 20, 1999) 1a

Appendix B:

Opinion of the United States District Court for the Southern District of West Virginia (September 30, 1998) 5a

Appendix C:

Order of the United States Court of Appeals for the Fourth Circuit denying petition for rehearing and rehearing en banc (September 20, 1999)..... 22a

Appendix D:

Arbitration Award (August 1, 1997) 23a

Appendix E:

Regulatory Provisions Involved 30a

TABLE OF AUTHORITIES

CASES: Page

AFSCME v. *Department of Cent. Management Servs.*, 671 N.E.2d 668 (Ill. 1996) 26
American Postal Workers Union v. *United States Postal Serv.*, 789 F.2d 1 (D.C. Cir. 1986), *cert. dismissed*, 485 U.S. 680 (1988) 22, 24
Belves Co. v. *Teamsters Local 986*, 791 F.2d 1391 (9th Cir. 1986), *cert. denied*, 485 U.S. 985 (1987) 22, 23
Braxton v. *United States*, 500 U.S. 344 (1991) 17
Chrysler Motors Corp. v. *International Union*, 959 F.2d 685 (7th Cir.), *cert. denied*, 506 U.S. 908 (1992) 16
Cleveland Bd. of Educ. v. *International Bhd. of Firemen & Oilers Local 701*, 696 N.E.2d 658 (Ohio Ct. App. 1997) 15, 27
Communications Workers of Am. v. *Southeastern Elec. Coop.*, 882 F.2d 467 (10th Cir. 1989) 16
Delta Air Lines, Inc. v. *Air Line Pilots Ass'n Int'l*, 861 F.2d 665 (11th Cir. 1988), *cert. denied*, 493 U.S. 871 (1989) 8, 13, 14, 26
Doe v. *Central Ark. Transit*, 900 S.W.2d 582 (Ark. Ct. App. 1995) 15
E.I. DuPont de Nemours & Co. v. *Grasselli Employees Indep. Ass'n of East Chicago, Inc.*, 790 F.2d 611 (7th Cir.), *cert. denied*, 479 U.S. 853 (1986) 22, 23, 24
Exxon Corp. v. *Baton Rouge Oil & Chem. Workers Union*, 77 F.3d 850 (5th Cir. 1996) 8, 9, 11, 12
Exxon Corp. v. *Esso Workers Union, Inc.*, 118 F.3d 841 (1st Cir. 1997) 9, 10, 14, 19
Exxon Corp. v. *Esso Workers Union, Inc.*, 942 F. Supp. 703 (D. Mass. 1996) 14
Exxon Shipping Co. v. *Exxon Seamen's Union*, 73 F.3d 1287 (3d Cir.), *cert. denied*, 517 U.S. 1251 (1996) 11, 12, 18, 25
Exxon Shipping Co. v. *Exxon Seamen's Union*, 11 F.3d 1189 (3d Cir. 1993) 12, 25
Exxon Shipping Co. v. *Exxon Seamen's Union*, 993 F.2d 357 (3d Cir. 1993) 12, 24, 25

TABLE OF AUTHORITIES—Continued

Page

Gulf Coast Indus. Workers Union v. *Exxon Corp.*, 991 F.2d 244 (5th Cir.), *cert. denied*, 510 U.S. 965 (1993) ..... *passim*

Hobson v. *American Cast Iron Pipe Co.*, 690 So. 2d 341 (Ala. 1997) 15

IBEW, Local 97 v. *Niagara Mohawk Power Corp.*, 143 F.3d 704 (2d Cir. 1998) 10, 29

In re Amalgamated Transit Union, Local 717, No. 98-038, 1999 WL 1054715 (N.H. Nov. 23, 1999) 14, 15

Iowa Elec. Light & Power Co. v. *Local Union 204, IBEW*, 834 F.2d 1424 (8th Cir. 1987) 16, 24

Kennecott Utah Copper Corp. v. *Becker*, —— F.3d ——, 1999 WL 989338 (10th Cir. Oct. 29, 1999) 10, 13, 14

Lingle v. *Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988) 21

Local 97, IBEW v. *Niagara Mohawk Power Corp.*, —— F.3d ——, 1999 WL 975711 (2d Cir. Oct. 28, 1999), *petition for cert. filed*, 68 U.S.L.W. 3355 (U.S. Nov. 16, 1999) (No. 99-845) 15, 28

Martin v. *Shaw's Supermarkets, Inc.*, 105 F.3d 40 (1st Cir.), *cert. denied*, 522 U.S. 818 (1997) 21

Muschany v. *United States*, 324 U.S. 49 (1945) 7, 17

Newsday, Inc. v. *Long Island Typographical Union*, 915 F.2d 840 (2d Cir. 1990), *cert. denied*, 499 U.S. 922 (1991) 16

NLRB v. *Dixie Motor Coach Corp.*, 128 F.2d 201 (5th Cir. 1942) 19

Northwest Airlines, Inc. v. *Air Line Pilots Ass'n, Int'l*, 808 F.2d 76 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1014 (1988) 13, 22, 23

Skinner v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) 19

Stead Motors of Walnut Creek v. *Automotive Machinists Lodge No. 1173*, 886 F.2d 1200 (9th Cir. 1989) (en banc), *cert. denied*, 495 U.S. 946 (1990) 27, 28

TABLE OF AUTHORITIES—Continued

	Page
Stroehmann Bakeries, Inc. v. *Local 776, Int'l Bhd. of Teamsters*, 969 F.2d 1436 (3d Cir.), *cert. denied*, 506 U.S. 1022 (1992)	16, 25, 28
Tennessee Valley Auth. v. *Tennessee Valley Trades & Labor Council*, 184 F.3d 510 (6th Cir. 1999)	10
Union Pacific R.R. v. *United Transp. Union*, 3 F.3d 255 (8th Cir. 1993), *cert. denied*, 510 U.S. 1072 (1994)	8, 13, 14
United Food & Commercial Workers Int'l Union, Local 588 v. *Foster Poultry Farms*, 74 F.3d 169 (9th Cir. 1996)	9, 10, 27, 28
United Paperworkers Int'l Union v. *Misco, Inc.*, 484 U.S. 29 (1987)	*passim*
United States Postal Serv. v. *American Postal Workers Union*, 736 F.2d 822 (1st Cir. 1984)	22, 23, 24, 26
United Transp. Union v. *Union Pacific R.R.*, 116 F.3d 430 (9th Cir. 1997)	9, 14
W.R. Grace & Co. v. *Local 759, Int'l Union of Rubber Workers*, 461 U.S. 757 (1983)	7, 17, 26
Westvaco Corp. v. *United Paperworkers Int'l Union*, 171 F.3d 971 (4th Cir. 1999)	16, 28

STATUTORY PROVISIONS:

28 U.S.C. § 1254(1)	2
28 U.S.C. § 1291	2
29 U.S.C. § 185	2
42 U.S.C. § 2473c	18
42 U.S.C. § 2473c(b)(3)	18
42 U.S.C. § 2473c(b)(5)	18
46 U.S.C. § 7702(c)(2)	18
49 U.S.C. § 5331	18
49 U.S.C. § 20140	18
49 U.S.C. § 31306	18

RULES AND REGULATIONS:

S. Ct. Rule 10(a)	17, 20
14 C.F.R. part 121, Appendix I	19
46 C.F.R. § 16.101(a)	19
49 C.F.R. § 219.1(a)	19

TABLE OF AUTHORITIES—Continued

	Page
49 C.F.R. § 382.101	19
49 C.F.R. § 382.301	4
49 C.F.R. § 382.301(a)	2
49 C.F.R. § 382.305	2
49 C.F.R. § 653.3	19

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Jeffrey Sarles, *The Case of the Missing Woman: Sexual Harassment and Judicial Review of Arbitration Awards*, 17 Harv. Women's L.J. 17 (1994) 30

TABLE OF AUTHORITIES—Continued

Page

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Arlus J. Stephens, *The Sixth Circuit's Approach to the Public-Policy Exception to the Enforcement of Labor Arbitration Awards: A Tale of Two Trilogies?*, 11 Ohio St. J. on Disp. Resol. 441 (1996) 15

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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Eastern Associated Coal Corporation respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Fourth Circuit is unreported and reproduced in the appendix hereto ("App.") at 1a. The opinion of the District Court for the Southern District of West Virginia is reported at 66 F. Supp. 2d 796 and reproduced at App. 5a.

JURISDICTION

The judgment of the Fourth Circuit was entered on August 20, 1999. App. 1a. The Fourth Circuit denied a timely petition for rehearing and rehearing en banc on September 20, 1999. App. 22a. The jurisdiction of the

Fourth Circuit was based on 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, provides in pertinent part: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter * * * may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." Pertinent provisions of Title 49 of the Code of Federal Regulations are reproduced at App. 30a.

INTRODUCTION

Eastern Associated Coal Corporation ("EACC") is a coal mining company. Its business requires the operation of heavy equipment—including trucks having gross vehicle weights of as much as 55,000 pounds—on public roads and highways. App. 6a. Operators of such equipment hold a position within EACC known as a Mobile Equipment Operator ("MEO"), and are required to have a commercial driver's license ("CDL"). Under regulations issued by the United States Department of Transportation ("DOT"), any person required to have a CDL must submit to drug and alcohol testing under specified circumstances. As the regulations apply to this case, they require such testing "[p]rior to the first time a driver performs safety sensitive functions for an employer," 49 C.F.R. § 382.301(a), and randomly thereafter, at a rate of at least 25 percent of an employer's drivers per year, unless adjusted by the Federal Highway Administration. *Id.* § 382.305.

This case concerns the ability of EACC and other employers to take strong disciplinary action against employees in safety sensitive positions who test positive for alcohol or drug use. EACC twice discharged the same MEO who tested positive for drug use, and on each occasion was required to reinstate that employee after a grievance procedure was concluded. The Fourth Circuit—adopting the position of the Second, Sixth, Ninth, and Tenth Circuits, in conflict with decisions of the First, Third, Fifth, Eighth, and Eleventh Circuits—held that such reinstatement was not contrary to public policy and affirmed the arbitrator's decision. The Fourth Circuit also endorsed the district court's determination that an award is contrary to public policy only when it would require illegal conduct on the part of the employer—an issue which has also divided the circuits and on which this Court granted certiorari, but did not reach, in *United Paperworkers International Union* v. *Misco, Inc.*, 484 U.S. 29 (1987).

This Court should grant certiorari on the related questions presented here to resolve the conflict in the circuits and to make clear that public policy prohibits forced reinstatement of drug abusers to safety sensitive positions —where they might endanger the lives of others—even if such reinstatement is not illegal *per se*.

STATEMENT OF THE CASE

Background. Together with the respondents—the United Mine Workers of America, District 17, and Local 1503 of the United Mine Workers (collectively, "the Union") —EACC is bound by the National Bituminous Coal Wage Agreement of 1993 ("Agreement"). App. 5a. Under the Agreement, "[t]he management of the mine, the direction of the working force and the right to hire and discharge are vested in" EACC. Ct. App. J.A. 34. EACC is permitted to discharge an employee for just cause, and

if the employee elects to follow the specified grievance procedure, the arbitrator must uphold the dismissal if he finds that just cause existed. *Id.* at 39-40.

Pursuant to the requirements of federal law, EACC has adopted a Drug and Alcohol Policy, which provides that "[i]f a driver submits a urine specimen for the purpose of a drug test, and the test shows positive levels * * * the driver will be removed from any safety sensitive position and subject to disciplinary action up to and including termination." App. 9a n.4. The company has thus made clear its position that a positive drug test constitutes "just cause" for termination.

James Smith's Positive Drug Tests. In early 1996, EACC drilling operator James Smith bid on and was selected to fill a vacant MEO position. Because his position required a CDL, Smith was required to submit to a drug test. *See* 49 C.F.R. § 382.301. In a test conducted in March 1996, Smith tested positive for the presence of cannabinoids—the chemical constituents of marijuana. Pursuant to the procedure outlined in the Agreement, EACC suspended Smith with the intent to discharge him, and then discharged him.

Neither Smith nor the Union ever challenged the accuracy of the 1996 drug test. App. 7a n.2. Nevertheless, Smith filed a grievance challenging his discharge, and an arbitrator entered an award in his favor. Under the award, Smith returned to work after a 30-day suspension without back pay and was required to participate in a substance abuse program. The arbitrator also required Smith to submit to random drug testing for five years. App. 7a.

In June 1997, while Smith was working as an MEO, his fourth random drug test yielded another positive result for cannabinoids, and EACC again suspended and then discharged him. App. 7a-8a. Smith again sought arbitration without challenging the accuracy of the test

results, and an arbitrator again ordered Smith reinstated. It is this second arbitration award, described more fully below, that is directly at issue in this case.

The Arbitration Award. The arbitrator found that "[t]he record is clear that the company has made a good faith effort through it's [sic] employee assistance program to rehabilitate the grievant." App. 27a. The arbitrator further recognized that "[i]t is understandable why the company wants to put an end to the matter by discharging grievant. The liability the company faces when an employee assigned to operate company equipment on public roads is found with drugs in his urine is very real." *Id.* The arbitrator found that Smith had received "full credit for his good record in the earlier arbitration" and for the fact that he was a "recreational user of illegal drugs and not an addicted user." *Id.* Criticizing Smith's argument that he might have avoided a first positive test had he been aware that he was going to be tested, the arbitrator noted that "[o]ne does not avoid illegal drugs because one might be tested," but rather because "drugs have a negative impact on job performance, safety and company liability." App. 28a.

Despite all this, the arbitrator once again "rescued" Smith from the "understandable" consequences of his actions. App. 27a. He found "creditable" Smith's testimony that a "personal/family problem" caused a "one time lapse in drug usage." App. 28a. While making that finding, however, the arbitrator recognized the possibility that he may have been "misled by the grievant," and the arbitrator apparently found comfort in the fact that he was "confident," if that were the case, "that the grievant will make another misstep with drug use and be caught." *Id.* Giving Smith the chance to make such a "misstep" while operating heavy equipment on the public highways, the arbitrator ordered Smith reinstated and required him to provide EACC with a resignation letter which the com-

pany could accept if Smith tested positive for drugs a third time. App. 29a.

Decisions Below. Seeking to overturn the arbitration award, EACC filed a complaint in district court which alleged, among other things, that "[c]lear, positive law, including the [DOT] Regulations, evidence a well defined and dominant public policy against the performance of safety sensitive tasks while under the influence of drugs," Ct. App. J.A. 13, and that the award "clearly violates this public policy" and therefore must be vacated. *Id.* at 14.

The district court upheld the arbitrator's decision. The court recognized that the question whether the award should be set aside on public policy grounds is "one for resolution by the courts." App. 17a (quoting *Misco*, 484 U.S. at 43 (citations and internal quotation marks omitted)). The court reviewed a variety of sources—including the DOT regulations and decisions from the First, Fifth, Eighth, and Eleventh Circuits—and determined that "a well defined and dominant policy exists against the use of controlled substances by those who perform safety sensitive jobs." App. 20a. The court determined, however, that Smith's *reinstatement* was not contrary to public policy because the DOT regulations "do not make it illegal to reinstate employees who test positive for drug use." App. 21a. Thus, in the court's view, the public policy exception to enforcement of arbitration awards is activated only when the award is illegal *per se*.

On appeal, the Fourth Circuit found that "the district court correctly decided the issues before it," and affirmed "on the reasoning of the district court." App. 4a.

REASONS FOR GRANTING THE WRIT

More than a dozen years ago, this Court in *Misco* articulated the rules applicable to review of arbitration awards on public policy grounds in considering an award

that ordered reinstatement of an employee suspected of bringing marijuana onto the work site. The Court affirmed its earlier holding in *W.R. Grace & Co.* v. *Local 759, International Union of Rubber Workers,* 461 U.S. 757, 766 (1983), that "the question of public policy is ultimately one for resolution by the courts," and that an arbitral award should not be enforced where its enforcement would violate a "well defined and dominant" public policy. *Id.* (citing *Muschany* v. *United States,* 324 U.S. 49, 66 (1945)).

Since the Court's decision in *Misco,* the lower courts have been called upon to apply the rules articulated in that case to a variety of different situations. One common fact pattern has repeatedly been at issue, as it was below: an employee in a safety sensitive position—truck driver, airline pilot, oil tanker seaman, and the like—tests positive for illegal drug use, is discharged by the employer, and ordered reinstated by an arbitrator. Courts reviewing such awards, and attempting to apply this Court's guidance in *Misco,* have reached dramatically different results. Employees in the Second, Fourth, Sixth, Ninth, and Tenth Circuits are reinstated in such circumstances, while those in the First, Third, Fifth, Eighth, and Eleventh Circuits are not. The Court should grant certiorari to review the deep conflict on this recurring and important question.

Also implicated by the decisions below is an issue on which this Court granted certiorari in *Misco* but found not necessary to reach—whether a court may refuse to enforce an arbitration award on public policy grounds only when the award itself violates positive law or requires unlawful conduct by the employer. *See* 484 U.S. at 45 n.12; *id.* at 46 (Blackmun, J., concurring). The Court thus recognized in 1987 that its review of this issue was necessary, and in the intervening twelve years the conflict on this question has deepened. The question

on which the Court granted certiorari in *Misco* remains one on which this Court's guidance is required.

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT IN THE COURTS OF APPEALS ON THE QUESTION WHETHER PUBLIC POLICY IS VIOLATED BY AN ARBITRAL AWARD ORDERING REINSTATEMENT, TO A SAFETY SENSITIVE POSITION, OF AN EMPLOYEE WHO HAS TESTED POSITIVE FOR ILLEGAL DRUG USE

A. The Circuits Are Divided On Reinstatement Of An Employee Who Tests Positive For Illegal Drug Use To A Safety Sensitive Position

In holding that Smith's reinstatement here did not violate a "well defined and dominant" public policy, the Fourth Circuit simply adopted wholesale the reasoning of the district court as its own. App. 4a. For its part, the district court identified "a plentitude of positive law to support the existence of a well defined and dominant public policy against the performance of safety sensitive jobs by employees under the influence of drugs." App. 18a. In support of this conclusion, the district court relied on decisions of the Fifth, Eighth, and Eleventh Circuits. *See* App. 18a-19a (citing *Gulf Coast Indus. Workers Union* v. *Exxon Corp.*, 991 F.2d 244 (5th Cir.), *cert. denied*, 510 U.S. 965 (1993); *Exxon Corp.* v. *Baton Rouge Oil & Chem. Workers Union*, 77 F.3d 850 (5th Cir. 1996); *Union Pacific R.R.* v. *United Transp. Union*, 3 F.3d 255 (8th Cir. 1993), *cert. denied*, 510 U.S. 1072 (1994); *Delta Air Lines, Inc.* v. *Air Line Pilots Ass'n Int'l*, 861 F.2d 665 (11th Cir. 1988), *cert. denied*, 493 U.S. 871 (1989)).

The court below also recognized that other decisions "expand[] this public policy from situations where the employee is shown to be under the influence of drugs to situations where the employee merely tests positive for

drugs although there is no evidence that he was under the influence while on the job." App. 19a (citing *Exxon Corp.* v. *Esso Workers Union, Inc.*, 118 F.3d 841 (1st Cir. 1997); *Exxon Corp.* v. *Baton Rouge, supra*). The district court seemingly endorsed that expanded public policy when it found, "[b]ased upon the foregoing, * * * that a well defined and dominant public policy exists against the use of controlled substances by those who perform safety sensitive jobs." App. 20a.

The court below, however, stopped short of following that policy to its logical conclusion, because it found no well defined and dominant policy "enjoining the employment of commercial motor vehicle drivers who test positive for drug use." App. 20a. *See also* App. 3a-4a. In endorsing this conclusion, the Fourth Circuit deepened an existing conflict on the question presented.

Consistent with the decision below, other circuits have also found that public policy is not violated by reinstating an employee to a safety sensitive position where the employee has tested positive for drug use. In *United Transportation Union* v. *Union Pacific Railroad Co.*, 116 F.3d 430 (9th Cir. 1997), the Ninth Circuit reversed a decision vacating an arbitration award which ordered reinstatement of a railroad employee who failed a drug test. While the district court had found an " 'explicit, well-defined, and dominant public policy against drug use in the railroad industry,' " *id.* at 433, the Ninth Circuit stressed that the arbitration panel had made no determination that the employee "had in fact used drugs on the day in question," *id.* at 434, and instead rested on the fact that the employee "merely" tested positive for drugs. *Id.* It concluded that "the relevant public policy does not specifically and explicitly militate against reinstatement of employees who have merely tested positive for drugs." *Id.* *See also United Food & Commercial Workers Int'l Union,*

Local 588 v. *Foster Poultry Farms*, 74 F.3d 169 (9th Cir. 1996).

The Tenth Circuit recently reached the same conclusion in *Kennecott Utah Copper Corp.* v. *Becker*, —— F.3d ——, 1999 WL 989338 (10th Cir. Oct. 29, 1999). *Kennecott* involved a positive drug test, unaccompanied by a finding "that grievant ever used drugs at work or was impaired while operating in a safety sensitive position." *Id.* at *4. The court held that no public policy was violated by a reinstatement order in these circumstances and specifically declined Kennecott's urging that it follow the decision of the First Circuit in *Esso Workers' Union, supra*, which, as discussed below, vacated a reinstatement order in similar factual circumstances.

The Second and Sixth Circuits are in alignment with the Fourth, Ninth, and Tenth Circuits. In *IBEW, Local 97* v. *Niagara Mohawk Power Corp.*, 143 F.3d 704, 718 (2d Cir. 1998), the Second Circuit upheld reinstatement of a nuclear power plant technician who "adulterated a drug test, subsequently tested positive for drugs, and denied having a substance abuse problem when initially confronted with the test results." The Sixth Circuit reached a similar result in *Tennessee Valley Authority* v. *Tennessee Valley Trades and Labor Council*, 184 F.3d 510 (6th Cir. 1999), which involved a nuclear reactor operator who tested positive for marijuana use.

In these decisions, the Second, Fourth, Sixth, Ninth, and Tenth Circuits have made clear that they will not upset arbitration awards ordering reinstatement as contrary to public policy where an employee in a safety sensitive position has tested positive for drug use. As we explain below, each of these cases would have come out differently in the First, Third, Fifth, Eighth, and Eleventh Circuits.

The First Circuit's decision in *Exxon Corp.* v. *Esso Workers' Union, supra*, is a leading case among those

in conflict with the rule in the Second, Fourth, Sixth, Ninth, and Tenth Circuits. The employee in *Esso Workers' Union*, also named Smith, was "responsible for loading, driving, and unloading a five-axle tractor-trailer combination which, when fully loaded, carries 12,000 gallons of highly flammable motor fuel," and "typically dr[o]ve[] this rig through many of New England's more densely populated areas." 118 F.3d at 843. Smith was fired after testing positive for cocaine in a random drug test, but was ordered reinstated after arbitration.

The First Circuit declined to enforce the arbitration award. After outlining the principles of review established in *Misco*, *id.* at 846, the First Circuit discussed decisions of the Third, Fifth, Eighth, and Eleventh Circuits, as well as statutory and regulatory provisions, and found "a solid phalanx of positive law evidencing a well defined and dominant public policy against the performance of safety-sensitive tasks while under the influence of drugs." *Id.* at 849. The court then rejected the argument—which the Fourth Circuit accepted below—that "reinstating Smith would not insult such a policy because there is no evidence that Smith was in the grip of cocaine while driving his petroleum truck," and " 'merely' " evidence that cocaine was in his blood stream. *Id.* at 849. Declining to require an employer to "await the occurrence of an accident before discharging an employee who tests positive for drug use," *id.*, the First Circuit held that the well defined and dominant public policy it identified permitted employers to discharge such employees.

The First Circuit noted that "recent cases track the expanding public policy on which we rely," *id.* at 850, citing *Baton Rouge Oil*, *supra*, and *Exxon Shipping Co.* v. *Exxon Seamen's Union*, 73 F.3d 1287 (3d Cir.), *cert. denied*, 517 U.S. 1251 (1996). In *Baton Rouge Oil*, the Fifth Circuit held that the public policy exception to enforcement of arbitration awards "must be read not only to

prohibit the prospective placement of an employee [who tested positive for drug use] into a position where he is a danger to his company and to fellow employees (*i.e.*, order of reinstatement into a safety-sensitive position)" but also to prohibit an alternative award of back pay to such an employee. 77 F.3d at 856.

For the former conclusion, which is at odds with the Fourth Circuit's decision here, the Fifth Circuit relied on its earlier decision in *Gulf Coast Industrial Workers Union* v. *Exxon, supra.* There, the court considered an arbitrator's order of reinstatement of an employee who—like the employee here—had tested positive for drug use a second time, on the view—like that of the arbitrator here—that the employee "seemed 'a good bet for successful rehabilitation.'" 991 F.2d at 248. The court surveyed federal statutes, state statutes, various regulations, and judicial decisions, *id.* at 250-254, to conclude that it would offend public policy for the employee to retain his job after twice testing positive for drug use. *Id.* at 255.

The Third Circuit has also aligned itself with the First and Fifth Circuits in three decisions each styled *Exxon Shipping Co.* v. *Exxon Seamen's Union.* In the first, reported at 993 F.2d 357 (3d Cir. 1993) (*Exxon I*), the court affirmed an order vacating an arbitration award that reinstated an oil tanker helmsman who tested positive for cannabinoids after a shipping accident. In the second case, reported at 11 F.3d 1189 (3d Cir. 1993) (*Exxon II*), the court upheld a district court order vacating an arbitration award reinstating a seaman who was "highly intoxicated while on duty." *Id.* at 1190. And in a third case, reported at 73 F.3d 1287 (3d Cir. 1996) (*Exxon III*), the court found that public policy would also support vacatur of an award ordering reinstatement of an employee who refused to submit to a drug test where the employer had cause to require such a test.

The Eighth Circuit has likewise held that reinstatement orders in these circumstances are contrary to public policy. In *Union Pacific Railroad* v. *United Transportation Union, supra*, a divided panel of the Eighth Circuit upheld the vacatur of an arbitrator's reinstatement award where a railroad brakeman failed a post-accident drug test. The court had "no difficulty in concluding that there exists a well-defined and dominant public policy against a railroad's employment of individuals whose impaired judgment due to the use of drugs or alcohol could seriously threaten public safety." 3 F.3d at 261. The court found this policy violated by the arbitration award reinstating "to his former position a railroad employee who poses a significant risk to the public because of his potential for future drug use on the job." *Id.* at 262.

Finally, the Eleventh Circuit rejected a reinstatement order where a commercial airline pilot was drunk while flying a passenger plane. *Delta Air Lines* v. *Air Line Pilot's Ass'n, supra.* The court held that the airline had just cause to terminate the pilot and that the reinstatement award in these circumstances violated public policy. 861 F.2d at 674.[1]

In *Kennecott*, the Tenth Circuit attempted to distinguish the decisions finding reinstatement to be contrary to public policy on the ground that those cases involved employees who "used drugs at work or [were] impaired while operating in a safety sensitive position," while cases reaching a different result involved employees who (in the

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[1] Prior to this Court's decision in *Misco*, the D.C. Circuit upheld a reinstatement order in factual circumstances very similar to those in which the Eleventh Circuit declined to do so. *See Northwest Airlines, Inc.* v. *Air Line Pilots Ass'n Int'l*, 808 F.2d 76 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1014 (1988). That circuit has not considered a similar case since that time, and—with the Seventh and Federal Circuits—are the only circuits not to be heard from since *Misco* on the question of reinstating employees who test positive for drug use.

words of the Ninth Circuit in *United Transportation Union*, 116 F.3d at 434) "merely" tested positive for illegal drugs without evidence of on-the-job use or impairment. *Kennecott*, 1999 WL 989338 at *4. While some of the decisions certainly do involve on-duty use or impairment, *see, e.g., Delta Air Lines, supra*, the cases do not rest on such a distinction. On the contrary, courts finding that reinstatement violates public policy have not required a finding that the employee who tests positive for drug use also be shown to have used drugs or been impaired while on the job, and have expressly noted the *absence* of such facts. *See, e.g., Esso Workers' Union*, 118 F.3d at 844 ("the test results could not indicate when Smith had used the cocaine or whether he had performed his job while still under its pernicious influence");[2] *Union Pacific*, 3 F.3d at 262 ("We emphasize that we have not decided whether Madison was in fact impaired by drugs at the time of the incident"); *Gulf Coast*, 991 F.2d at 254 ("The record does not show that Woods was impaired while on duty or that he used cocaine on Exxon's premises."). In each of these cases, a reinstatement award was vacated; in the Second, Fourth, Sixth, Ninth, and Tenth Circuits, the decision would have come out the other way.

These decisions—all issued after this Court's decision in *Misco*—make clear that the circuits are hopelessly conflicted on application of the public policy exception to enforcement of arbitration awards reinstating employees who fail drug tests—the use of which is widespread in industries whose operations present public safety risks.[3]

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[2] The district court in *Esso Workers' Union* had in fact distinguished its decision to uphold reinstatement from others that vacated reinstatement on the ground that the latter involved on-duty conduct. *See* 942 F. Supp. 703, 709 n.1 (D. Mass. 1996). The First Circuit's reversal made plain that it did not—as the Tenth Circuit in *Kennecott* mistakenly assumed—require on-duty misconduct to find that reinstatement was against public policy.

[3] State appellate courts are likewise in conflict over the public policy question at issue here. *Compare, e.g., In re Amalgamated*

The confusion over the public policy exception, moreover, is not limited to that particular context, but extends to reinstatement decisions where other workplace rules reflecting public policy have been violated.[4] Thus, for example, the Second Circuit has declined to disturb reinstatement awards where employees violated safety regulations at nuclear power facilities, *see Local 97, IBEW* v. *Niagara Mohawk Power Corp.*, —— F.3d ——, 1999 WL 975711 (2d Cir. Oct. 28, 1999), *petition for cert. filed*, 68 U.S.L.W. 3355 (U.S. Nov. 16, 1999) (No. 99-845),

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Transit Union, Local 717, No. 98-038, 1999 WL 1054715 (N.H. Nov. 23, 1999) (dominant public policy prohibits reinstatement to a safety sensitive position of those who test positive for drug use); *Hobson* v. *American Cast Iron Pipe Co.*, 690 So. 2d 341, 345 (Ala. 1997) ("We hold that Alabama public policy precludes awarding reinstatement and back pay to a 'safety sensitive' employee who is discharged for testing positive for a controlled substance in the workplace."); *Cleveland Bd. of Educ.* v. *International Bhd. of Firemen & Oilers Local 701*, 696 N.E.2d 658, 667 (Ohio Ct. App. 1997) ("[W]e find that enforcement of the arbitrator's award [of reinstatement] is contrary to an explicit, well-defined and dominant public policy of state and federal law to suppress illegal drug use among transportation employees."), *with Doe* v. *Central Ark. Transit*, 900 S.W.2d 582, 585 (Ark. Ct. App. 1995) ("We do not believe the arbitrator's decision [reinstating bus driver who tested positive for cocaine] violated public policy").

[4] *See* Scott Barbakoff, *Application of the Public Policy Exception for the Enforcement of Arbitral Awards: There is no Place Like "the Home" in* Saint Mary Home, Inc. v. Service Employees International Union, District 1199, 43 Vill. L. Rev. 829, 830-831, 841-848 (1998) (perceiving three-way split on public policy exception); Murray S. Levin, *The Role of Substantive Law in Business Arbitration and the Importance of Volition*, 35 Am. Bus. L.J. 105, 156 (1997) ("Both before and after *Misco*, the lower courts have struggled with the public policy ground for vacation."); Arlus J. Stephens, *The Sixth Circuit's Approach to the Public-Policy Exception to the Enforcement of Labor Arbitration Awards: A Tale of Two Trilogies?*, 11 Ohio St. J. on Disp. Resol. 441, 444 (1996) (After *Misco*, "there continues to be disagreement among the circuit courts as to how expansive—or narrow—the parameters are for judges to vacate awards on this [public policy] basis"); *id.* at 450-455 (describing conflicting decisions).

while the Eighth Circuit has reached the opposite conclusion. *Iowa Elec. Light & Power Co.* v. *Local Union 204, IBEW*, 834 F.2d 1424, 1427 (8th Cir. 1987).

The Fourth Circuit recognized the existence of a similar conflict earlier this year in *Westvaco Corp.* v. *United Paperworkers International Union, AFL-CIO*, 171 F.3d 971 (4th Cir. 1999), where it upheld an arbitrator's decision to reinstate an employee who had repeatedly sexually harassed a co-worker. The court "agree[d] with those circuits that have concluded the general public policy against sexual harassment is not sufficient to supplant labor arbitration of employee disciplinary sanctions," *id.* at 977,[5] and expressly declined to side with circuits reaching a contrary holding. *Id.*[6] While the *Westvaco* court was careful to point out that its decision did not involve "conduct that compromises the performance of a safety-sensitive job" or "criminal statutes prohibiting drug use, possession, and distribution in the workplace," which "may raise concerns not present here," *id.* at 977 n.2, the Fourth

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[5] Citing *Chrysler Motors Corp.* v. *International Union*, 959 F.2d 685 (7th Cir.) (upholding arbitrator's reinstatement of employee dismissed for sexual harassment), *cert. denied*, 506 U.S. 908 (1992); *Communications Workers of Am.* v. *Southeastern Elec. Coop.*, 882 F.2d 467 (10th Cir. 1989) (same).

[6] Citing *Stroehmann Bakeries, Inc.* v. *Local 776, Int'l Bhd. of Teamsters*, 969 F.2d 1436, 1442 (3d Cir.) (holding over dissent that "an award which fully reinstates an employee accused of sexual harassment without a determination that the harassment did not occur violates public policy"), *cert. denied*, 506 U.S. 1022 (1992); *Newsday, Inc.* v. *Long Island Typographical Union*, 915 F.2d 840, 845 (2d Cir. 1990) (affirming decision vacating award of reinstatement on the ground that it "completely disregarded the public policy against sexual harassment in the workplace"), *cert. denied*, 499 U.S. 922 (1991). *See also* Stephen Buehrer, *A Clash of the Titans: Judicial Deference to Arbitration and the Public Policy Exception in the Context of Sexual Harassment*, 6 Am. U. J. Gender & L. 265, 281-282 (1998) (noting "the contradictory views which cloud this area of the law" and the "sharp[] contrast" between decisions of the Second and Third Circuits and those of the Seventh and Tenth Circuits).

Circuit glided over those concerns in this case, and extended its position to cover conduct that *does* compromise the performance of a safety sensitive job and involve criminal statutes prohibiting drug use in the workplace.

Thus, a decision by this Court in this case will provide not only resolution of the public policy question concerning reinstatement to safety sensitive positions of employees who test positive for drugs but also much needed guidance on how courts should address reinstatement orders where an employee has violated workplace rules and related public policies. The Court should grant certiorari to address the deep circuit conflict over these important and recurring issues. *See* S. Ct. Rule 10(a); *Braxton* v. *United States*, 500 U.S. 344, 347 (1991) (a "principal purpose for which we use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals").

B. There Is A Well Defined And Dominant Public Policy Against Reinstatement Of Employees Who Test Positive For Illegal Drug Use To Safety Sensitive Positions

The Fourth Circuit's decision below not only implicated a well defined split on a recurring issue, but also reached the wrong resolution of that issue under the principles articulated in *W.R. Grace* and *Misco*. In *Misco*, this Court repeated its admonition that public policy sufficient to permit a court to decline to enforce an arbitration award "must be 'ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interests."'" 484 U.S. at 44 (quoting *W.R. Grace*, 461 U.S. at 766 (quoting *Muschany*, 324 U.S. at 66)). Here, examination of the "laws and legal precedents" makes clear that there *is* a well defined and dominant public policy against having employees who test positive for drugs operating in safety sensitive positions, and that arbitration awards ordering employers to re-

instate such employees to those jobs—where scores or hundreds of lives might be endangered—violate that public policy, as the First, Third, Fifth, Eighth, and Eleventh Circuits have held. *See, e.g., Esso Workers' Union*, 118 F.3d at 846-850 (discussing various bases for discerning this public policy); *Gulf Coast*, 991 F.2d at 250-255 (same).

Congress has repeatedly spoken to the issue, by enacting a series of industry-specific testing requirements for those who occupy safety sensitive positions. In support of such requirements, Congress has found that "the greatest efforts must be expended to eliminate the abuse of alcohol and the use of illegal drugs, whether on duty or off duty, by those individuals who are involved in the positions affecting safety, security, and national security." 42 U.S.C. § 2473c(b)(3). Because "the most effective deterrent to abuse of alcohol and the use of illegal drugs is increased testing, including random testing," *id.* § 2473c (b)(5), Congress has required drug testing programs for, among others, those in safety sensitive positions in the space program, *id.* § 2473c, employed as merchant seaman, 46 U.S.C. § 7702(c)(2), related to mass transportation, 49 U.S.C. § 5331, operating rail equipment, 49 U.S.C. § 20140, and responsible for operation of commercial motor vehicles. 49 U.S.C. § 31306.

The judgment of Congress is also reflected in a variety of regulations designed to implement the congressional command. As the Third Circuit observed in *Exxon III*, "[t]he federal government has manifested its strong support for drug testing of employees involved in mass transportation through the promulgation by all federal agencies governing mass transportation of regulations designed to prevent drug use by employees in safety sensitive positions." 73 F.3d at 1294. Such regulations include those issued by the Federal Aviation Administration, the Coast Guard, the Federal Railroad Administration, the Federal

Transit Administration, and—as directly applicable here—the Federal Highway Administration. *See Esso Workers' Union*, 118 F.3d at 848 (citing 14 C.F.R. part 121, Appendix I; 46 C.F.R. § 16.101(a); 49 C.F.R. §§ 219.1(a), 653.3, 382.101). As a whole, this regulatory structure confirms that the use of illegal drugs by those in safety sensitive positions is contrary to well defined and dominant public policy.

This Court too has recognized a "governmental interest in ensuring the safety of the travelling public and of the employees themselves," which "plainly justifies prohibiting covered employees from using alcohol or drugs on duty, or while subject to being called for duty." *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 621 (1989).[7]

Requiring employers to reinstate employees who test positive for drug use to jobs affecting worker and public safety plainly violates this dominant policy. As the First Circuit has observed, "[i]t makes no sense to construe public policy as encouraging—and in some cases mandating—employers to establish and enforce drug testing programs, yet to preclude them from taking decisive action against those employees who test positive." *Esso Workers' Union*, 118 F.3d at 850. On the contrary, "it would insult public policy for a court to enforce a contract that requires the ongoing employment in a safety-sensitive capacity of a worker who has scorned the employer's drug-free workplace program." *Id.* at 851.

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[7] This dominant public policy is not a recent invention. *See NLRB* v. *Dixie Motor Coach Corp.*, 128 F.2d 201, 203 (5th Cir. 1942) ("the public interest * * * requires of any one entrusted with the lives and safety of the travelling public that he conduct himself in a manner in keeping with his responsibilities. * * * The undisputed facts show that this employee's drinking habits * * * place[d] upon his employer *the duty* to discharge him.") (emphasis added).

The insult is particularly notable here. Smith did not "merely" fail a drug test, but was a repeat offender. His dismissal occurred after he once tested positive for drug use, was put on notice that he would face random drug tests in the future, and then failed a subsequent drug test. While the arbitrator somehow took comfort in his supposition that Smith would be caught if he once again engaged in illegal drug use, App. 28a, it makes a mockery of the public policy described above to require the employer—and the public—to shoulder the risk that Smith's third strike might be discovered by sifting through the rubble of an accident involving Smith's 55,000 pound truck. Well defined and dominant public policy prohibits enforcement of an arbitration award requiring petitioner to entrust the operation of such a vehicle on the public highways to a repeat user of illegal drugs.

C. The Issue Is Important And Recurring

The need for resolution of the deep conflict in the courts of appeals is underscored by the undeniable importance and recurring nature of the issue dividing the courts. *See* S. Ct. Rule 10(a). Workplace safety is a national concern, with implications reaching far beyond the workplace itself. Over 5,000 people die from work-related injuries each year. *See, e.g.*, Bob Fernandez, *Doubts Rise About U.S. Workplace-Safety Data*, Knight Ridder Tribune Business News (May 14, 1999). A recent study by the U.S. Department of Labor estimates that 47 percent of all workplace accidents are drug-related. *See* S.L. Smith & Virginia Sutcliffe, *The Real Deal: Drugs in the Workplace*, Occupational Hazards, Vol. 60, No. 9, at 23 (Sept. 1, 1998). According to the National Institute of Drug Abuse, a drug-using employee is 3.6 times more likely to be involved in a workplace accident. *See* U.S. Department of Labor, *Facts and Figures about Drugs and Alcohol in the Workplace*, Working Partners for an Alcohol- and Drug-Free Workplace (visited Dec. 15, 1999)

<http: / www.dol.gov / asp / public / programs / drugs / facts.htm>.

Employing individuals who use drugs in safety sensitive positions not only puts the health and safety of others at risk, but also increases the costs of doing business. It is estimated that illegal drug use costs American businesses more than $60 billion annually—costs that include tragic workplace accidents. *See* Jeffrey S. Klein & Nicholas J. Pappas, *Implementing and Enforcing Drug Treatment Programs—Part I*, 220 N.Y. L.J. 3 (Aug. 3, 1998).

The Fourth Circuit's decision—and those of the other circuits with which it is aligned—raise grave concerns because they seriously compromise the ability of employers to ensure workplace safety. These concerns are particularly heightened where, as here, an employee in a safety sensitive position who has tested positive for drugs poses a threat to the public at large because, for example, he operates a motor vehicle on public roads or works in a nuclear power plant. The issue concerning the reinstatement of employees who test positive for drugs to safety sensitive positions is therefore one of great consequence, and merits this Court's review.

The issue is also one that will obviously continue to recur. Not only does the sheer number of cases cited in this Petition suggest as much, but the standard use of arbitration clauses in labor agreements in a wide variety of industries leaves no doubt that it will. *See, e.g., Lingle* v. *Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 411 n.11 (1988) (arbitrators are designated by nearly all collective bargaining agreements as the adjudicators of contract disputes); *Martin* v. *Shaw's Supermarkets, Inc.*, 105 F.3d 40, 42 (1st Cir.) (arbitration clauses are "almost always a feature of labor contracts"), *cert. denied*, 522 U.S. 818 (1997). This Court's resolution of the issue presented is therefore necessary to ensure consistent results in countless future cases.

II. THIS COURT SHOULD ALSO ANSWER THE QUESTION ON WHICH IT GRANTED CERTIORARI, BUT DID NOT RESOLVE, IN *MISCO*

A. *Misco* Failed To Resolve A Conflict In The Courts Of Appeals Over Whether An Arbitrator's Award Must Violate Positive Law To Violate Public Policy

In *Misco*, this Court granted certiorari on the question whether a court may refuse to enforce an arbitration award on public policy grounds "only when the award itself violates a statute, regulation, or other manifestation of positive law, or compels conduct by the employer that would violate such a law." 484 U.S. at 45 n.12; *see id.* at 46 (Blackmun, J., concurring). The same question—which the *Misco* Court did not reach and on which the circuits remain in conflict—is presented again here.

This Court in *Misco* observed that "the Courts of Appeals are divided on the question of when courts may set aside arbitration awards as contravening public policy." *Id.* at 35. The Court noted that the Ninth and D.C. Circuits have taken a "narrower view" of a court's power and that the First and Seventh Circuits have taken a "broader view." *Id.* at 35 n.7.[8]

In *American Postal Workers Union*, the D.C. Circuit held that a court may refuse to enforce an arbitration award on public policy grounds only "if the award itself violates established law or seeks to compel some unlawful action." 789 F.2d at 8. Thus, the D.C. Circuit concluded

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[8] Citing *Belves Co.* v. *Teamsters Local 986*, 791 F.2d 1391 (9th Cir. 1986), *cert. denied*, 485 U.S. 985 (1987); *Northwest Airlines* v. *Air Line Pilots*, 808 F.2d 76 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1014 (1988); *American Postal Workers Union* v. *United States Postal Serv.*, 789 F.2d 1 (D.C. Cir. 1986), *cert. dismissed*, 485 U.S. 680 (1988); *United States Postal Serv.* v. *American Postal Workers Union*, 736 F.2d 822 (1st Cir. 1984); *E. I. DuPont de Nemours & Co.* v. *Grasselli Employees Indep. Ass'n of East Chicago, Inc.*, 790 F.2d 611 (7th Cir.), *cert. denied*, 479 U.S. 853 (1986).

that the district court had erred in refusing to enforce an arbitrator's decision to reinstate a discharged postal worker because "[t]he arbitrator's award was not itself unlawful, for there is no legal proscription against the reinstatement of a person such as the grievant." *Id. Accord Northwest Airlines*, 808 F.2d at 83.

Similarly, in *Belves*, the Ninth Circuit held that reinstatement of employees terminated because they were undocumented aliens did not violate public policy. The court explained that "[n]either the company nor its employees are subject to any criminal or civil liability under federal law arising from their employment relationship." 791 F.2d at 1392-93.

In contrast, the First Circuit in *United States Postal Service* held that an award reinstating an employee convicted of embezzling postal funds was properly overturned on public policy grounds. The court rejected "[t]he heart of the Union's argument * * * that although there may be a public policy against embezzling Postal Service funds, there is no public policy against the Postal Service employing convicted embezzlers. You have to have something more—a direct legal prohibition." 736 F.2d at 824.

The Seventh Circuit in *DuPont* also rejected the view (advanced in a separate opinion by Judge Easterbrook) "that an arbitration award cannot be overturned on public policy grounds unless the contract as construed by the arbitrator violates some rule of positive law." 790 F.2d at 616. The majority observed that "the courts have never construed the public policy exception so narrowly." *Id.* Relying on the First Circuit's decision *United States Postal Service*, the *DuPont* court said that "[i]f the Postal Service employs a convicted embezzler, this employment does not violate any rule of positive law, yet the First Circuit overturned an award which ordered reinstatement of such an employee, because the award violated public policy." *Id.*

B. The Conflict In The Circuits Over The Question Left Open In *Misco* Has Grown Worse

The conflict recognized by this Court in *Misco* has not been resolved but in fact has deepened. At least six circuits—the First, Third, Fifth, Seventh, Eighth, and Eleventh—have rendered decisions that squarely conflict with decisions of three other circuits—the Fourth, Ninth, and District of Columbia.

Two weeks after *Misco* was decided, the Eighth Circuit in *Iowa Electric Light and Power* v. *Local Union 204, supra*, agreed with the First and Seventh Circuits and rejected the view that an arbitration award must violate positive law to permit application of the public policy exception. The court observed that "[t]his Court is not required to find that the award itself is illegal before we overrule the arbitrator on public policy grounds." 834 F.2d at 1427 n.3. Noting that *Misco* "declined to reach the issue," the Eighth Circuit held that "[a]n arbitrator may be overruled 'when the award, although not requiring illegal conduct, is said to be inconsistent with some significant public policy.' " *Id.* (quoting Robert A. Gorman, *Labor Law: Unionization and Collective Bargaining* 597 (1982); citing *DuPont* and *United States Postal Service* with a "but see" cite to *American Postal Workers Union*).

The Third Circuit entered the fray with its *Exxon* trilogy. In *Exxon I*, the Third Circuit noted that while "[a]t least one Court of Appeals"—the D.C. Circuit—has held that an arbitrator's award "only violates public policy where it contravenes a rule of positive law which forbids reinstatement of the employee," 993 F.2d at 363, "[o]ther courts have taken a broader approach." *Id.* The Third Circuit cited as supporting the "broader approach" the Seventh Circuit's decision in *DuPont*, the Eighth Circuit's decision in *Iowa Electric*, the First Circuit's decision in *United States Postal Service*, and a Sixth Circuit case. The *Exxon I* court held that "[t]he broader test adopted by the

First, Sixth, Seventh, and Eighth Circuits appears to be the sounder approach to the question whether an arbitration award violates public policy." *Id.*[9]

In *Exxon II*, the Third Circuit noted that "[w]hile *Misco* left open the question whether an arbitration award may be set aside on public policy grounds only when enforcement of the award would violate positive law, two recent decisions of our court have explicitly or implicitly rejected that argument." 11 F.3d at 1192 (citing *Exxon I* and *Stroehmann Bakeries*).[10] The *Exxon II* court noted that "the District of Columbia Circuit ha[s] accepted this argument but * * * the First, Sixth, Seventh, and Eighth Circuits" have rejected it, and that *Exxon I* had "expressly rejected this argument" and "upheld a district court order vacating an arbitration award that did not require conduct that violated any statute, regulation, or other manifestation of positive law." *Id.*[11]

In *Gulf Coast Industrial Workers Union* v. *Exxon, supra*, the Fifth Circuit sided with the circuits holding that an arbitrator's award need not violate positive law

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[9] Unlike the Third Circuit, we believe the Sixth Circuit's position on the violation-of-positive-law requirement is unclear.

[10] In *Stroehmann Bakeries*, the Third Circuit held that an arbitrator's award that "fully reinstates an employee accused of sexual harassment without a determination that the harassment did not occur violates public policy." 969 F.2d at 1442. And as the Third Circuit pointed out in *Exxon II*, "[w]e reached this conclusion without identifying any statute, regulation or court decision that made the reinstatement of the deliveryman—as opposed to the alleged harassment—illegal. Thus, our decision in *Stroehmann Bakeries* implicitly rejected the argument that an arbitration award may be vacated on public policy grounds only when the award requires conduct that is prohibited by positive law." 11 F.3d at 1192.

[11] *See also Exxon III*, 73 F.3d at 1293 ("In both *Exxon I* and *Exxon II* we acknowledged that [the D.C. Circuit] court of appeals had held than an arbitration award could be overturned only when its enforcement would cause a violation of positive law, whereas others have opted for a broader approach") (citations omitted).

to violate public policy. The view that "unless the award itself constitutes a clear violation of positive law, courts are powerless to intervene," said the Fifth Circuit, is "a question left purposefully unresolved by the Supreme Court in *Misco*, 484 U.S. at 45, n.12, and *expressly rejected by this Court*." 991 F.2d at 253 (emphasis added). The court said that "[l]egal authority generally holds that a court need not find that the award itself is illegal before overruling an arbitrator on public policy grounds." *Id.* at 250 n.7 (citing Gorman, *Labor Law, supra; DuPont*, 790 F.2d at 616; *Iowa Elec.*, 834 F.2d at 1427-28 n.3; *United States Postal Serv.*, 736 F.2d at 824). And it concluded that "refusing to vacate an arbitration award unless it violates some manifestation of positive law would be difficult to square with 'the more general doctrine . . . that a court may refuse to enforce contracts that violate law *or* public policy.'" *Id.* (quoting *W.R. Grace*, 461 U.S. at 766) (ellipses and emphasis supplied by the Fifth Circuit).

In *Delta Airlines* v. *Air Line Pilots, supra*, the Eleventh Circuit held that it was against public policy to reinstate an airline pilot who flew while intoxicated. Although the court identified numerous statutes and regulations prohibiting that conduct, it cited no positive law forbidding reinstatement of a pilot who flies drunk. Instead, the court held that an arbitrator's order requiring that "the employer suffer that malperformance and not discharge the offender does itself violate the same well established public policy." 861 F.2d at 674.[12]

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12 State appellate courts, which look to federal case law for guidance in applying the public policy exception, have also weighed in on this issue in recent years. *See AFSCME* v. *Department of Cent. Management Servs.*, 671 N.E.2d 668, 679, 680 (Ill. 1996) ("We believe that a bright-line test requiring that the award itself violate an *explicit* law has the potential to swallow the public policy exception. * * * [W]e decline AFSCME's invitation to adopt such

In conflict with the decisions of the First, Third, Fifth, Seventh, Eighth, and Eleventh Circuits (as well as the state courts cited in footnote 12), the Ninth Circuit has held that an arbitration award must violate positive law for it to be invalid on public policy grounds. In *Foster Poultry Farms, supra,* two commercial vehicle operators had been discharged pursuant to a drug testing program, and an arbitrator ordered reinstatement. On appeal, the Ninth Circuit rejected the argument that the reinstatements violated public policy. The court held that "[b]ecause the DOT regulations do not make it illegal to reinstate employees who test positive for drug use, it *cannot* be said that the DOT regulations 'specifically militate[] against the relief ordered by the arbitrator' in this case." 74 F.3d at 174 (quoting *Stead Motors of Walnut Creek* v. *Automotive Machinists Lodge No. 1173,* 886 F.2d 1200, 1212-13 (9th Cir. 1989) (en banc), *cert. denied,* 495 U.S. 946 (1990)) (emphasis in original).[13] The Ninth Circuit further explained that:

> The DOT regulations * * * do not express an explicit, well-defined and dominant public policy permanently enjoining the employment of commercial

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a rigid rule") (emphasis in original); *Cleveland Bd. of Educ.* v. *International Bhd. of Firemen & Oilers Local 701,* 696 N.E.2d at 664 (rejecting the view that a "reinstatement award has to violate a rule of positive law before it violates public policy" and following *Exxon I*).

[13] In *Stead Motors,* a plurality of the en banc Ninth Circuit held that "[i]f a court relies on public policy to vacate an arbitral award reinstating an employee, it must be a policy that bars *reinstatement*" and that a court "must demonstrate that the policy is one that specifically militates against the relief ordered by the arbitrator." 886 F.2d at 1212-13 (opinion of Reinhardt, J.) (emphasis in original). As Judge Trott noted in dissent, the plurality opinion "suggest[ed] that only a precise violation of a positive law caused by the award itself would suffice to meet the Supreme Court's test—a question left undecided in *Misco.*" *Id.* at 1222 (Trott, J., dissenting).

> motor vehicle drivers who test positive for drug use. The DOT regulations only prohibit employees who test positive for drug use from operating commercial motor vehicles; the DOT regulations do not require that such employees be automatically discharged. [*Id.* (internal quotation marks omitted).]

With the decision below and *Westvaco*, the Fourth Circuit has now joined the Ninth and D.C. Circuits in opposition to the First, Third, Fifth, Seventh, Eighth, and Eleventh Circuits. In *Westvaco*, an arbitrator reinstated an employee terminated for sexual harassment. In upholding that decision, the Fourth Circuit explained that "while it is certainly true that there is a public policy against sexual harassment, the district court formulated it in too general a fashion. There is no public policy that every harasser should be fired." 171 F.3d at 977. Nowhere in the case law and regulations concerning Title VII of the Civil Rights Act, said the *Westvaco* court, "is there the suggestion that every employee who makes a mistake must automatically lose his or her job." *Id. But see Stroehmann Bakeries, supra* (discussed in note 10, *supra*).

In keeping with *Westvaco*, the decision in this case turned on the fact that "the DOT Regulations do not require that employees who test positive for drug use be automatically discharged." App. 20a-21a. *See also* App. 21a ("Because the DOT Regulations do not make it illegal to reinstate employees who test positive for drug use, it cannot be said that the DOT Regulations 'specifically militate against the relief ordered by the arbitrator' in this case.") (quoting *Foster Poultry Farms*, 74 F.3d at 174). In other words—in the language of the question presented in *Misco*—the courts below held here that since Smith's reinstatement was not contrary positive law, it was not against public policy.

In *Local 97, IBEW* v. *Niagara Mohawk Power Corp.*, —— F.3d ——, 1999 WL 975711 (2d Cir. Oct. 28,

1999), *petition for cert. filed*, 68 U.S.L.W. 3355 (U.S. Nov. 16, 1999) (No. 99-845), the Second Circuit seemingly sided with the minority view that only a violation of positive law can trigger the public policy exception. There, a nuclear power plant argued that reinstatement of a security officer who failed to respond to an alarm and then lied to investigators about the incident would violate a Nuclear Regulatory Commission ("NRC") regulation requiring that nuclear power workers be "trustworthy and reliable." The court concluded, however, that this regulation "by itself is too general a standard to justify the reversal of an arbitrator's reinstatement award based on public policy grounds." 1999 WL 975711 at *9. But the court added that a public policy against reinstatement "perhaps" would be proved "if the Company could demonstrate that the NRC itself—if confronted with the Arbitrator's findings concerning [the employee]'s conduct—would unequivocally deem [his] conduct so severe as to render him ineligible for future employment." *Id.* at *10. This suggests that the Second Circuit would deem a given reinstatement against public policy if that were the NRC's view even absent a regulation specifically forbidding reinstatement. Thus, the Second Circuit's law is somewhat uncertain.[14]

Accordingly, "considerable uncertainty remains in the federal circuit courts regarding the proper scope of the public policy exception" since "several federal circuits hold that the award must actually compel a violation of positive law to meet the public policy exception" while others hold "contrary views." Bret F. Randall, *The History, Application, and Policy of the Judicially Created Stand-*

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[14] In 1998, in *IBEW* v. *Niagara Mohawk*, *supra*, the Second Circuit noted the conflict on the question left open in *Misco*, *see* 143 F.3d at 722, but concluded that it "need not adopt" the "more restrictive view" to find the public policy exception inapplicable. *Id.*

ards of Review for Arbitration Awards, 1992 BYU L. Rev. 759, 777. As another commentator has said, "[i]f the Court intended *Misco* to put to rest the controversy and confusion over application of the public policy exception, it has not been demonstrably successful. Lower courts continue to split over the breadth of the exception's application." Jeffrey Sarles, *The Case of the Missing Woman: Sexual Harassment and Judicial Review of Arbitration Awards*, 17 Harv. Women's L.J. 17, 24 (1994) (footnote omitted).

The issue left for another day in *Misco* is raised again here. Time has only fueled the conflicts that prompted the grant of certiorari in that case. When the Court granted certiorari in *Misco*, the circuit conflict was 2-2. It is now 6-3. This Court should take this opportunity to answer the question left open in *Misco*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

RONALD E. MEISBURG
HEENEN, ALTHEN & ROLES
1110 Vermont Ave., N.W.
Suite 400
Washington, D.C. 20005
(202) 887-0800

JOHN G. ROBERTS, JR.*
DAVID G. LEITCH
H. CHRISTOPHER BARTOLOMUCCI
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

ANNA M. DAILEY
DONNA C. KELLY
HEENAN, ALTHEN & ROLES
1380 One Valley Square
P.O. Box 2549
Charleston, West Virginia 25329
(304) 342-8960

* Counsel of Record

Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 98-2527

EASTERN ASSOCIATED COAL COMPANY,
Plaintiff-Appellant,

v.

UNITED MINE WORKERS OF AMERICA, DISTRICT 17;
LOCAL 1503, UNITED MINE WORKERS OF AMERICA,
Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of West Virginia, at Charleston
No. CA-97-819-2
John T. Copenhaver, Jr., District Judge

Argued May 6, 1999
Decided Aug. 20, 1999

Before WIDENER, ERVIN, and WILKINS, Circuit Judges.

OPINION

PER CURIAM.

Eastern Associated Coal Company ("Eastern") appeals a district court order granting summary judgment to

United Mine Workers of America, District 17 and Local Union 1503 (collectively, "UMWA") in Eastern's action seeking vacatur of a labor arbitration award. Concluding that the district court correctly decided the issues before it, we affirm.

I.

The present dispute arises out of the National Bituminous Coal Wage Agreement of 1993 ("the Wage Agreement"), a collective bargaining agreement to which Eastern and UMWA are parties. The Wage Agreement reserves exclusively to Eastern the right to hire and discharge employees but provides that "[n]o Employee covered by this Agreement may be disciplined or discharged except for just cause." J.A. 39. Although "just cause" is not defined in the Wage Agreement itself, Eastern's substance abuse policy states that any employee who tests positive for illegal drugs must "be removed from any safety sensitive position and subject to disciplinary action up to and including termination." J.A. 62 (internal quotation marks omitted).

James Smith was employed by Eastern as a mobile equipment operator. In that capacity, Smith was required to have a current commercial driver's license and to operate heavy equipment. On March 25, 1996, Smith was subjected to a random drug test and tested positive for cannabinoids. As a result of the test, he was suspended and eventually discharged. Smith grieved the discharge, and his case proceeded to arbitration. Following a hearing, the arbitrator issued an award returning Smith to work after a 30-day suspension without back pay. In addition, Smith was required to take part in a substance abuse program. The award further required that Smith be subject to random drug testing at the discretion of

either Eastern or an approved substance abuse professional over a five-year period.

Smith tested negative for illegal drugs on three subsequent occasions. However, on June 27, 1997, Smith again tested positive for cannabinoids. Again, he was suspended and subsequently discharged, and again, he grieved the discharge and his case proceeded to arbitration. The arbitrator found that Smith's lapse in his abstinence from recreational drug use was an isolated occurrence caused by a family problem. Accordingly, the arbitrator issued an award suspending Smith through October 29, 1997, but then reinstating him, subject to certain conditions. Those conditions included, *inter alia*, that Smith would receive no back pay, that he would reimburse Eastern and UMWA for the costs of both arbitrations, and that he would provide a signed, undated letter of resignation which would be dated and accepted if he tested positive for any illegal drug, or refused to submit to a drug test, in the following five years.

Eastern sought vacatur of the award in the district court, maintaining that the award does not draw its essence from the Wage Agreement and that it violates a public policy against the use of illegal drugs by persons in safety-sensitive positions. The district court granted summary judgment against Eastern. The court reasoned that because neither the Wage Agreement nor Eastern's substance abuse policy requires that discharge is mandated as the punishment for employees who test positive for illegal drugs, the arbitrator rationally could have concluded that there was not just cause for that punishment under the facts presented here. The court also ruled that the arbitrator's award was not contrary to a well-defined and dominant public policy because although there is a public policy against the use of illegal drugs by those in

safety-sensitive positions, there is no such policy against the reinstatement of employees who have used illegal drugs in the past.

II.

On appeal, Eastern, repeating the arguments it advanced below,[1] contends that the district court erred in granting UMWA's motion for summary judgment. Having had the benefit of oral argument and the parties' briefs, and after careful consideration of the record and the applicable law, we conclude that the district court correctly decided the issues before it. Accordingly, we affirm on the reasoning of the district court. *See Eastern Associated Coal Corp. v. UMWA, District 17*, No. 2:97-0819 (S.D.W.V. Sept. 30, 1998).[2]

AFFIRMED.

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[1] Eastern also argues for the first time in its reply brief that, even if the arbitrator rationally found no just cause for discharge, the arbitrator violated the Wage Agreement by fashioning his own punishment instead of ordering that Smith be reinstated immediately. However, because this argument is advanced for the first time in Eastern's reply brief, it is not properly before this court, and we decline to address it. *See Cavallo v. Star Enter.*, 100 F.3d 1150, 1152 n. 2 (4th Cir. 1996).

[2] UMWA's motion for leave to file an additional responsive memorandum is granted.

APPENDIX B

[Entered Sep. 30, 1998]

IN THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF WEST VIRGINIA AT CHARLESTON

Civil Action No. 2:97-0819

EASTERN ASSOCIATED COAL CORP.,
Plaintiff

v.

UNITED MINE WORKERS OF AMERICA, DISTRICT 17, AND LOCAL UNION No. 1503,
Defendants

MEMORANDUM ORDER

This matter is before the court on cross motions for summary judgment filed by the parties pursuant to Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185. Plaintiff seeks vacation of an arbitration award. Defendants oppose vacation of the award and seek to have the award confirmed and enforced by the court.

I. *Background*

The following facts are not disputed by the parties. Plaintiff Eastern Associated Coal Corporation ("Eastern") and defendants United Mine Workers of America, District 17, and United Mine Workers of America Local Union 1503 (collectively, "UMWA"), are parties to a collective bargaining agreement known as the National Bituminous Coal Wage Agreement of 1993 (the "Wage Agreement").

Article IA, Section (d) of the Wage Agreement reserves to Eastern the exclusive right to hire and discharge employees. (Plaintiff's Motion for Summary Judgment, Attachment 1). The right of Eastern to discharge employees is limited, however, by Article XXIV, Section (a) of the Wage Agreement, which provides that "[n]o employee covered by this Agreement may be disciplined or discharged except for just cause." (*Id.*). Article XXIV, Section (d)(3) of the Wage Agreement applies to those situations where an employee grieves a discharge and the case proceeds to arbitration. Under such circumstances, Section (d)(3) mandates that:

> If the arbitrator determines that the Employer has failed to establish just cause for the Employee's discharge, the Employee shall be immediately reinstated to his job. If the arbirtator determines that there was just cause for the discharge, the discharge shall become effective upon the date of the arbitrator's decision.

(*Id.*).

Eastern employs a road crew charged with maintaining its mine haulage roads. Members of the road crew hold positions with the company known as Mobile Equipment Operators ("MEO"). Included within the duties performed by MEOs is the operation of equipment having gross vehicle weights ranging from 32,000 to 55,000 pounds on public roads and highways. Operators of such equipment are required to have a commercial driver's license ("CDL") and are subject to certain sections of the Federal Motor Carrier Safety Regulations promulgated by the United States Department of Transportation (the "DOT Regulations").[1] Eastern implemented a random

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[1] The Federal Motor Carrier Safety Regulations, 49 C.F.R. § 382.101 *et seq.*, require that any person required to have a CDL

drug testing policy for its MEO staff in accordance with the DOT Regulations.

In early 1996, James Smith, a drilling operator with Eastern, posted for a vacant MEO position and was eventually hired. In conjunction with his new position, Mr. Smith was required to have a CDL in order to carry out the duties of the job. Pursuant to the DOT Regulations, Mr. Smith was subjected to a random drug test on March 25, 1996. He tested positive for the presence of cannabinoids.[2] In accordance with Article XXIV of the Wage Agreement, Eastern initially suspended Mr. Smith with the intent to discharge and then discharged him. Mr. Smith filed a grievance challenging his discharge and the case proceeded to arbitration.

Arbitrator Jerome H. Ross heard the case and issued an award on April 18, 1996, returning Mr. Smith to work after a 30-day suspension without back pay and requiring Mr. Smith to participate in a substance abuse progam. In addition, the arbitrator's award required Mr. Smith to submit to random drug testing at the discretion of either Eastern or some other approved substance abuse professional for a period of five years.

Mr. Smith was randomly tested again on April 24, 1996, October 11, 1996, and January 27, 1997; each time he tested negative for illegal drug use. On June 27, 1997, Mr. Smith was randomly tested at which time he tested

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submit to controlled substances testing under specific circumstances, including when an employee transfers from a non-CDL position to a CDL position. 49 C.F.R. § 382.301. In addition, the regulations also provide for random drug testing of any person holding a CDL. *Id.* at § 382.305.

[2] Neither the UMWA nor Mr. Smith challenged the results of the March 25, 1996 drug test.

positive for cannabinoids.[3] Eastern again suspended Mr. Smith with intent to discharge and subsequently discharged him. Mr. Smith grieved his discharge and the case proceeded to arbitration in front of Arbitrator Jerome T. Barrett.

The issues before Arbitrator Barrett were framed as follows: (1) "Was the suspension with intent to discharge of grievant James Smith on July 14, 1997 for just cause?" and (2) "And if not, what is the appropriate remedy?" (Defendant's Motion for Summary Judgment, Attachment A at p. 2).

Arbitrator Barrett identified the pertinent portions of the Wage Agreement as follows: (1) Article 1A, Section (d) which reserves to Eastern the exclusive right to hire and discharge its working force; (2) Article III, Section (a) which grants all employees the right to a safe and healthful work environment; (3) Article III, Section (g) which requires Eastern employees to comply with reasonable rules and regulations of Eastern so long as such rules or regulations do not conflict with state and federal laws; and (4) Article XXIV, Sections (a) through (d) regarding Eastern's discharge, grievance and arbitration procedures. (*Id.* at pp. 2-3).

Eastern argued at the arbitration hearing that it had just cause to discharge Mr. Smith as a result of his testing positive for drug use on two separate occasions during a sixteen month period in which time he was employed as a heavy equipment operator. (*Id.* at pp. 3-4). Eastern argued that the DOT Regulations and its own internal drug policy were implemented to curb drug use by employees occupying safety sensitive positions. (*Id.*

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[3] Neither the UMWA nor Mr. Smith challenged the results of the June 27, 1997 drug test.

at p. 3). According to the company, Mr. Smith's drug use jeopardized the safety of other Eastern employees as well as the public at large and made his discharge just under the circumstances. (*Id.* at p. 4). The company further argued that it was proper to discharge Mr. Smith in order to send a clear message to all Eastern employees of the company's serious stance against employee drug use. (*Id.*).

The UMWA countered by citing to Mr. Smith's employment record, noting that the two failed drug tests were the only bad marks on an otherwise exemplary 17-year employment history with Eastern. (*Id.*). The UMWA argued that discharge was too severe a penalty given Mr. Smith's long-term service with Eastern. (*Id.*). Moreover, the union argued that neither Eastern's drug policy nor the DOT Regulations required mandatory discharge of an employee under these circumstances.[4] (*Id.*).

After summarizing the testimony adduced at a hearing held on July 28, 1997, and the positions of the parties, Arbitrator Barrett found that:

> It is understandable why the company wants to put an end to the matter by discharging grievant. The liability the company faces when an employee assigned to operate company equipment on public

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[4] Eastern's Drug and Alcohol Policy and Testing Procedures were entered into evidence by the company at the arbitration hearing. Although the entirety of the drug policy was not entered as part of the record before the court, Eastern cited to paragraph E in its response to the UMWA's motion for summary judgment, filed December 12, 1997. Paragraph E of Eastern's drug policy provides that "[i]f a driver submits a urine specimen for the purpose of a drug test, and the test shows positive levels . . . the driver will be removed from any safety sensitive position and subject to disciplinary action up to and including termination." (Plaintiff's Response to Defendant's Motion for Summary Judgment, at p. 7 n. 3).

> roads is found with drugs in his urine is very real. As is the cost of a second arbitration for the same employee on the same issue within a sixteen month period.
>
> Having been an otherwise solid employee for a significant period of time is certainly in grievant's favor. However, grievant got full credit for his good record in the earlier arbitration. Also to his credit in the earlier case, he was found to be a recreational user of illegal drugs and not an addicted user. Being rescued by an arbitrator from losing his job in 1996 and having to face an invasive program of rehabilitation would seem to have provided unambiguous notice of the need to correct his behavior. It should have been interpreted as a clear message that drug use and secure employment do not mix.
>
> * * *
>
> Grievant made a very personal appeal under oath to the arbitrator concerning a personal/family problem which caused this one time lapse in drug usage. The arbitrator found this testimony creditable [sic]. If the arbitrator was misled by the grievant, the arbitrator is confident that the grievant will make another misstep with drug use and be caught. The remedy provided here will assure that the company and union will not be required to use arbitration again for this grievant where drugs are involved.

(*Id.* at pp. 4-5).

Arbitrator Barrett issued an award suspending Mr. Smith until October 20, 1997, and then reinstating him, subject to the following conditions:

1. No back pay for any loss during this suspension.
2. The award by Arbitrator Ross in CAS No. 93-17-96-472 is reinstated.

3. Grievant will reimburse the company and the union for the arbitrators' bills in both the Ross case and the instant case.

4. Grievant will provide the union and company with a signed, undated letter of resignation which the company may date and accept if grievant tests positive for any illegal drug in the next five years.

5. During the grievant's suspension periods, grievant's name shall remain in the company's random drug testing program. If grievant fails to take a required test during his suspension, the company can date and accept his resignation letter.

6. The company and union may agree that unusual or unforeseen circumstances justify waiving any conditions set forth above.

(*Id.* at p. 6).

In its motion for summary judgment, Eastern seeks vacation of the award on the grounds that the award is contrary to public policy and that it fails to draw its essence from the Wage Agreement. In addition, Eastern contends that Arbitrator Barrett exceeded the authority granted to him pursuant to the Wage Agreement by failing to address the issue of whether Eastern had just cause to discharge Mr. Smith. The UMWA contends in its summary judgment motion that the award did not contravene any well defined and dominant public policy and was based upon the arbitrator's interpretation of the contract so as to draw its essence from the Wage Agreement. Accordingly, the UMWA seeks enforcement of the award.

II. *Discussion*

It is well settled that courts overwhelmingly defer to the arbitrator's resolution of a labor dispute. Under the

United States Supreme Court's *Steelworkers* Trilogy, it is clear that judicial review of labor arbitration awards under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, is extremely limited. *See United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960). In restricting judicial review, the Court has emphasized:

> [T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

Enterprise Wheel, 363 U.S. at 599. Consequently, courts are not authorized to reconsider the merits of an arbitration award despite allegations by the parties that the award is based upon erroneous facts or a misinterpretation of the underlying contract. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987). "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *Id.* at 38.

Nevertheless, the arbitrator may not "ignore the plain language of the contract." *Id.* Rather, the arbitrator's award "must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice." *Id.* An award fails to draw its essence from the contract "if the arbitrator must have based his award on his own personal notions of right and wrong", *Upshur*

Coals Corp. v. UMWA, Dist. 31, 933 F.2d 225, 229-30 (4th Cir. 1991) (citing *E. I. DuPont de Nemours & Co. v. Grasselli Employees Indep. Ass'n*, 790 F.2d 611, 614 (7th Cir. 1986), *cert. denied*, 479 U.S. 853 (1986)), or is not "rationally inferable" or "in some logical way" derived from the collective bargaining agreement, *Brotherhood of R.R. Trainmen v. Central of Ga. Ry.*, 415 F.2d 403, 412 (5th Cir. 1969), *cert. denied*, 396 U.S. 1008 (1970). An award does not draw its essence from the collective bargaining agreement if the award conflicts with the express terms of the contract, *Vic Wertz Distrib. Co. v. Teamsters Local 1038, Nat'l Conf. of Brewery Workers*, 898 F.2d 1136, 1141-43 (6th Cir. 1990), or the meaning given to clear and unequivocal contract language by the arbitrator is "other than that expressed by the agreement." *Georgia-Pacific Corp. v. Local 27, United Paperworkers Int'l Union*, 864 F.2d 940, 944 (1st Cir. 1988).

In determining whether an award draws its essence from the collective bargaining agreement, it is also appropriate to consider whether the arbitrator exceeded his contractual authority. *Delta Queen Steamboat Co. v. District 2 Maine Eng'rs Beneficial Ass'n*, 889 F.2d 599, 602 (5th Cir. 1989), *cert. denied*, 498 U.S. 853 (1990). When a collective bargaining agreement provides that disciplinary rights are reserved exclusively to management, and specifies conduct that warrants discharge, the arbitrator may not infringe on those rights by modifying the discipline imposed. *Warrior & Gulf Navigation Co. v. United Steelworkers of America*, 996 F.2d 279 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 1834 (1994) (where agreement provides for immediate discharge of employee who tests positive for drugs a second time, arbitrator, on finding that second positive test was legitimate, may not reduce penalty to disciplinary suspension); *Delta Queen*,

889 F.2d 599 (where agreement reserves to management the sole responsibility to discipline and discharge for proper cause, such as carelessness, and the arbitrator finds "grossly careless" conduct by discharged employee, the arbitrator may not award reinstatement notwithstanding his belief that discharge was unfair in light of the employee's long-standing service); *Georgia-Pacific*, 864 F.2d 940, 944-46 (where agreement provides for immediate discharge for dishonesty and arbitrator makes factual finding of dishonesty, he may not award reinstatement on the reasoning that employee's years of faithful performance constitute a "countervailing factor" entitling him to at least one opportunity to correct his ways before being discharged).

In those instances where the collective bargaining agreement does not specify the conduct that constitutes cause for discharge, arbitrators may look to other sources for guidance. Among the sources deemed to be an integral part of the agreement are management work rules and disciplinary enforcement policies and practices. *Norfolk Shipbuilding & Drydock Corp. v. Local No. 684, Int'l Bhd. of Boilermakers*, 671 F.2d 797, 799-800 (4th Cir. 1982); *see also Brigham & Women's Hosp. v. Massachusetts Nurses Assoc.*, 684 F. Supp. 1120, 1123-24 (D. Mass. 1988) (where agreement gave employer right to discharge for "just cause," arbitrator properly looked to hospital's disciplinary policy to determine meaning of the term). Indeed, it is held that where the collective bargaining agreement reserves to management the right to make and enforce disciplinary rules, rules promulgated pursuant to that authority are thus incorporated into the collective bargaining agreement and have "the force of contract language." *General Drivers, Warehousemen & Helpers Local Union 968 v. Sysco Food Services, Inc.*, 838 F.2d 794, 799 nn. 1, 4 (5th Cir. 1988). Where a

collective bargaining agreement reserves to management the right to establish reasonable rules and regulations and the right to discharge for cause, but does not set out what constitutes just cause, it is proper for the arbitrator to look to company rules and regulations to determine whether or not a discharge was warranted. *Posadas de Puerto Rico Assoc., Inc. v. Union de Trabajadores de la Industria Gastronomica, Local 610*, 670 F. Supp. 58, 63 (D.P.R. 1987).

Here, the collective bargaining agreement between Eastern and the UMWA reserves to Eastern the right to implement reasonable rules and regulations not inconsistent with federal and state laws. Eastern's drug policy was implemented by the company in accordance with its reserved right to implement rules and regulations. Consequently, it must be deemed an integral part of the collective bargaining agreement. *See General Drivers, Warehousemen & Helpers Local Union 968*, 838 F.2d at 796, 799 nn. 1, 4. For its part, Eastern has asserted as much in its brief before the court.[5] Moreover, the UMWA has not challenged Eastern's right under the collective bargaining agreement to impose the drug policy, adopted by Eastern primarily for the purpose of complying with the DOT Regulations. In fact, the UMWA relied upon the drug policy during the arbitration proceeding as support for its position that discharge was inappropriate under the circumstances.

Under the Wage Agreement, Eastern has the exclusive right to direct its work force, including the right to hire and discharge its employees. Eastern's right to discharge

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[5] In its memorandum in support of its motion for summary judgment, Eastern asserted that its substance abuse policy "must be deemed an integral part of the collective bargaining agreement." (Plaintiff's Memorandum in Support of Motion for Summary Judgment, at p. 12).

employees is limited, however, to those situations where the company has just cause. The term "just cause" is not defined in the Wage Agreement itself. Thus, Arbitrator Barrett was obligated to look to other sources, including the company's substance abuse policy, for guidance in determining whether Mr. Smith's discharge was warranted. Eastern's substance abuse policy requires that an employee who tests positive for drugs be "removed from any safety sensitive position and subject to disciplinary action up to and including termination." *See supra* page 6, n. 4.

Having decided that the substance abuse policy is an integral part of the Wage Agreement, any decision made by the arbitrator pursuant to the disciplinary standard set forth within the company's substance abuse policy would be appropriate. Although Arbitrator Barrett did not specifically find the existence of just cause to discharge Mr. Smith, a reading of his entire opinion leads the court to conclude that he found just cause to discipline Mr. Smith, in accordance with the terms of the substance abuse policy. Specifically, Arbitrator Barrett suspended Mr. Smith for two and one-half months without pay, then reinstated him subject to several conditions, including continuation of random drug testing for a period of five years as well as mandatory resignation in the event of any future positive drug test. Based upon this award, it appears as though Arbitrator Barrett interpreted the substance abuse policy to allow for suspension and discipline. Inasmuch as the substance abuse policy calls for the removal of employees in safety sensitive positions, but does not call for mandatory discharge, the court finds that the arbitrator's award, suspending Mr. Smith for two and one-half months without pay, and reinstating him subject to strict conditions, is "rationally inferable" from the Wage Agreement. Having found that the award is rationally inferable from the Wage

Agreement, the court does not find that Arbitrator Barrett exceeded his authority under the agreement.

Eastern argues that *Mountaineer Gas Co. v. Oil, Chem. & Atomic Workers Int'l Union*, No. 2:93-0862 (S.D. W. Va. February 27, 1995), *aff'd*, 76 F.3d 606 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 80 (1996), is controlling in this action, and requires the court to vacate the arbitrator's award on the ground that it represents the arbitrator's own brand of industrial justice and does not draw its essence from the Wage Agreement. However, the facts of this case are to be distinguished from those before the court in *Mountaineer*. In *Mountaineer*, the company's substance abuse policy contained a provision requiring immediate termination of any employee testing positive for drug use. Here, Eastern's substance abuse policy does not require mandatory termination. Rather, the policy requires discipline "up to and including termination." The disciplinary standard embodied within Eastern's substance abuse policy differentiates this case from *Mountaineer*. Accordingly, the court finds that Arbitrator Barrett's award draws its essence from the Wage Agreement and does not represent his own "brand of industrial justice."

Eastern also argues that Arbitrator Barrett's award should be set aside on public policy grounds. The question of public policy is "ultimately one for resolution by the courts." *Misco*, 484 U.S. 29, 43. However, courts should be reluctant to vacate arbitration awards on public policy grounds. *Id.* Therefore, an arbitrator's award should be set aside only in those situations "where the contract as interpreted would violate 'some explicit public policy' that is 'well defined and dominant' ". *Id.* (quoting *W.R. Grace & Co. v. Int'l Union of United Rubber Workers*, 461 U.S. 757, 767 (1983)). A well defined and dominant public policy is one that may "be ascertained by reference to the laws and legal precedents and not

from general considerations of supposed public interests." *Id.* Consequently, a "formulation of public policy based only on 'general considerations of supposed public interests' is not the sort that permits a court to set aside an arbitration award that was entered in accordance with a valid collective-bargaining agreement." *Id.* at 44. Thus, to vacate an arbitration award on public policy grounds, the court must find that "an explicit, well defined and dominant public policy exists and the policy is one that specifically militates against the relief ordered by the arbitrator." *United Food & Commercial Workers Int'l Union, Local 588 v. Foster Poultry Farms*, 74 F.3d 169, 174 (9th Cir. 1995) (quoting *Arizona Elec. Power Coop., Inc. v. Berkeley*, 59 F.3d 988, 992 (9th Cir. 1995)).

In this action, Eastern argues that the DOT Regulations articulate a well defined and dominant public policy against the operation of dangerous machinery by employees who test positive for drug use. The DOT Regulations were promulgated to encourage employers "to establish programs designed to help prevent accidents and injuries resulting from the misuse of alcohol or use of controlled substances by drivers of commercial motor vehicles." 49 C.F.R. § 382.101 (1998). According to Eastern, the DOT Regulations were enacted primarily to protect the public from injury and necessarily cover those situations where an employee tests positive for drug use despite a lack of evidence that he was under the influence of drugs while operating heavy equipment.

The court must first determine whether or not there is a well defined and dominant public policy militating against the arbitrator's decision in this case. There is a plentitude of positive law to support the existence of a well defined and dominant public policy against the performance of safety sensitive jobs by employees under the influence of drugs. *See, e.g., Gulf Coast Indus. Workers*

Union v. Exxon Corp., 991 F.2d 244, 252-53 (5th Cir. 1993) (recognizing that numerous statutes, regulations, and judicial opinions "pronounce the emphatic national desire to eradicate illicit drugs from the workplace," particularly in safety sensitive occupations); *Exxon Corp. v. Baton Rouge Oil & Chem. Workers Union*, 77 F.3d 850, 855-56 (5th Cir. 1996) (finding within the Federal Railroad Administration regulations a well defined and dominant public policy against the performance of safety sensitive jobs while under the influence of drugs); *Union Pacific R.R. Co. v. United Transp. Union*, 3 F.3d 255, 262 (8th Cir. 1993) (court concluded that Federal Railroad Administration regulations incorporate a well defined and dominant public policy against permitting railroad employees to perform their jobs while under the influence of intoxicants); *Delta Air Lines, Inc. v. Air Line Pilots Ass'n Int'l*, 861 F.2d 665, 674 (11th Cir. 1988) (court recognized clear established public policy contained within Federal Aviation Administration regulations condemning operation of passenger airliners by pilots under the influence of drugs or alcohol).

Additionally, there is legal precedent which expands this public policy from situations where the employee is shown to be under the influence of drugs to situations where the employee merely tests positive for drugs although there is no evidence that he was under the influence while on the job. *See Exxon Corp. v. Esso Workers Union, Inc.*, 118 F.3d 841 (1st Cir. 1997) (holding that reinstatement of employee in safety sensitive job who failed drug test violated public policy embodied within the Drug-Free Workplace Act despite lack of evidence that employee was under influence of drugs at work); *Exxon Corp. v. Baton Rouge Oil & Chem. Workers Union*, 77 F.3d 850, 856 (5th Cir. 1996) (holding that allowing

employee to collect back pay would contravene public policy contained within Federal Railroad Administration regulations despite the absence of any evidence that employee had actually performed his job while drug-impaired).

Based upon the foregoing, the court finds that a well defined and dominant public policy exists against the use of controlled substances by those who perform safety sensitive jobs. Thus, Eastern has satisfactorily negotiated the first step of the public policy analysis. To abandon Arbitrator Barrett's award as contrary to public policy, however, the court must also find that his award of reinstatement contravenes the identified policy. *Exxon Corp. v. Esso Workers Union, Inc.*, 118 F.3d at 849. Eastern argues that the public policy embodied in the DOT Regulations is sufficiently well defined and dominant to support vacation of Arbitrator Barrett's award. There is no question that the DOT Regulations relied upon by Eastern articulate a well defined and dominant public policy against drug use by persons employed as commercial motor vehicle drivers.[6] Nevertheless, the DOT Regulations do not express an explicit, well defined public policy permanently enjoining the employment of commercial motor vehicle drivers who test positive for drug use. Specifically, the DOT Regulations do not require that employees who test positive for drug use be automatically

---

[6] The purpose of the DOT Regulations is to encourage employers "to establish programs designed to help prevent accidents and injuries resulting from the misuse of alcohol or use of controlled substances by drivers of commercial motor vehicles." 49 C.F.R. § 382.101. The DOT Regulations also indicate that the purpose behind the CDL requirement is "to help reduce or prevent truck and bus accidents, fatalities, and injuries by requiring drivers to have a single commercial motor vehicle driver's license and by disqualifying drivers who operate commercial motor vehicles in an unsafe manner." *Id.* at § 383.1.

discharged. Here, the arbitrator ordered reinstatement of Mr. Smith, subject, however, to several conditions, including continued random drug testing and mandatory resignation in the event of a future positive drug test. Because the DOT Regulations do not make it illegal to reinstate employees who test positive for drug use, it cannot be said that the DOT Regulations "specifically militate against the relief ordered by the arbitrator" in this case. *United Food & Commercial Workers Int'l Union, Local 588*, 74 F.3d at 174. Consequently, the public policy exception does not apply inasmuch as the arbitrator's award is consistent with the DOT Regulations.

III. *Conclusion*

For the reasons stated, it is ORDERED that defendants' motion for summary judgment be, and it hereby is, granted. Accordingly, it is further ORDERED that plaintiff's motion for summary judgment be, and it hereby is, denied.

The Clerk is directed to forward copies of this order to all counsel of record.

Dated September 30, 1998

/s/ John T. Copenhaver, Jr.
JOHN T. COPENHAVER, JR.
United States District Judge

APPENDIX C

FILED September 20, 1999

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-2527
CA-97-819-2

EASTERN ASSOCIATED COAL COMPANY,
Plaintiff-Appellant

v.

UNITED MINE WORKERS OF AMERICA, DISTRICT 17;
LOCAL 1503, UNITED MINE WORKERS OF AMERICA,
Defendants-Appellees

ON PETITION FOR REHEARING
AND REHEARING EN BANC

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
Clerk

APPENDIX D

ARBITRATION AWARD

Re: 93-17-97-737
Issue: Discharge
Grievant: James Smith

In the Matter of
EASTERN ASSOCIATED COAL CORP.

and

UNITED MINE WORKERS OF AMERICA
DISTRICT 17, LOCAL 1503

This is an arbitration pursuant to the CAS rules created by the parties to the National Agreement of the BCOA and UMWA. On July 28, 1997, a hearing was held in the Honey-In-The-Rock Motel at Beckley, West Virginia before the undersigned arbitrator. Since this is a discharge case and a bench award was required, it was issued orally within two hours after the conclusion of the hearing.

At the hearing, each party was afforded an opportunity to present witnesses and evidence, and to examine and cross-examine witnesses. The parties submitted four joint exhibits: the wage agreement, the grievance, the suspension letter and DOT regulations. The company presented 15 exhibits including 11 arbitration awards. The union presented 10 exhibits, all arbitration awards. Each party provided testimony from one witness.

The Grievance

On July 17, 1997, James Smith filed a timely grievance which stated:

"I have been suspended with intent to discharge. Management cannot show just cause in this case. I ask to be reinstated to my job with all lost wages and benefits." (Jt. Exh. 2.)

The suspension letter, dated July 14, 1997, gave the following reason for the company action:

"Testing positive for illegal substances (cannabinoids) 2nd offense. Violation of company's drug and alcohol policy. (Jt. Exh. 3)

The Issue

The issue before the arbitrator is:

Was the suspension with intent to discharge of grievant James Smith on July 14, 1997 for just cause?

And, if not, what is the appropriate remedy?

Relevant Contractual Provisions and Policies

Art. IA Scope and Coverage

Section (d) Management of the Mine

The management of the mine, the direction of the working force and the right to hire and discharge are vested exclusively in the Employer.

Art. III Health and Safety

Section (a) Right to a Safe Workplace

Every employee covered by this agreement is entitled to a safe and healthful place to work, and the parties jointly pledge their individual and joint efforts to attain and maintain this objective.

Section (g) Safety Rules and Regulations

Reasonable rules and regulations of the employer, not inconsistent with federal and state laws, for the protection of the persons of the employees and preservation of property shall be complied with.

Art. XXIV Discharge Procedures

Section (a) Just Cause Requirement

Section (b) Procedures

Section (c) Suspension

Section (d) Immediate Arbitration

Background

The factual basis for this grievance are as follows:

In January 1996 DOT regulation (Jt. Exh. 4) began requiring that drivers of commercial vehicles be subject to testing for illegal drug use. In March 1996, grievant tested positive for an illegal drug (cannabinoids). Between providing a test sample and hearing the results of the test, the grievant sought assistance from the company because he believed the test would be positive. An employee assistance company interviewed the grievant and determined that he was a recreational user not an addicted user. Even before an arbitration hearing on his grievance, concerning a notice of suspension with intent to discharge, the grievant attended several sessions with the employee assistance counsel concerning his use of illegal drugs.

The arbitration resulted in grievant being returned to work after 30 days with no back pay and required him to participate in a substance abuse program, plus subjecting him to testing at the discretion of the company or the substance abuse program for five years. (Co. Exh. 3)

Subsequently, grievant tested negative on April 24, 1996, July 16, 1996, October 11, 1996, and January 27, 1997. On June 27, 1997, grievant was tested as part of the company's random testing program to which all employees are subjected. His test was positive. The company's action based on that test lead to the instant case.

Company Position

The company takes seriously the wage agreement language on providing a safe work place. The company believes that that safety requirement extends to the public using public roads. The company is also concerned about the liability exposure for allowing an impaired employee to drive company equipment on public roads. Both the company policy on drug use and the DOT regulations place an obligation on the company.

This is the grievant's second offense in a 16 month period. While grievant has been a very good employee during his 17 years with the company, it is obvious he has not been rehabilitated by the opportunity provided by the company's employee assistance program or the earlier arbitration.

The company has the behavior of other employees to consider in this matter. Other employees must see the negative consequences of drug use. Therefore, the company's action in this matter is reasonable and it meets the just cause standards.

Union Position

The grievant has had an excellent employment record during 17 years with the company. The incident in April 1996 and in July 1997 are the only two problems he has ever had while employed by the company. A company witness has confirmed this. Should the grievant be re-

placed by a miner from the panel, the employer would not get as good an employee as the grievant.

While the grievant is guilty as charged, there are mitigating circumstances which make discharge too extreme a penalty. Given the grievant's excellent employment record and the mitigation circumstance, of a personal/family nature, the grievant should be given a lesser penalty than discharge.

Neither the company's drug and alcohol policy nor the DOT regulations require the termination of an employee under the circumstances of this case. (Co. Exh. 5 and Jt. Exh. 4)

Discussion and Opinion

The record is clear that the company has made a good faith effort through it's employee assistance program to rehabilitate the grievant. From April 1996 to July 1997, the grievant appeared to be making a good faith effort to be rehabilitated. His failure to stay drug free is disappointing to everyone concerned. It is understandable why the company wants to put an end to the matter by discharging grievant. The liability the company faces when an employee assigned to operate company equipment on public roads is found with drugs in his urine is very real. As is the cost of a second arbitration for the same employee on the same issue within a sixteen month period.

Having been an otherwise solid employee for a significant period of time is certainly in grievant's favor. However, grievant got full credit for his good record in the earlier arbitration. Also to his credit in the earlier case, he was found to be a recreational user of illegal drugs and not an addicted user. Being rescued by an arbitrator from losing his job in 1996 and having to face an invasive

program of rehabilitation would seem to have provided unambiguous notice of the need to correct his behavior. It should have been interpreted as a clear message that drug use and secure employment do not mix.

In the earlier case, the arbitrator makes two references to the grievant's and the union's view of drug testing. He said:

> "In this regard, the Union observed that the grievant did not believe he would be required to submit to a pre-employment drug test, because in his Core Driller position he had been performing duties covered under the (DOT) Regulations."
>
> (page 4 of Co. Exh. 3)

> "I find unpersuasive the Union's argument that the grievant would not have smoked marijuana if he believed that drug testing would be required in conjunction with assuming the duties of the Mobile Equipment Operator position."
>
> (page 6 of Co. Exh. 3)

This is very faulty thinking on the part of both the union and the grievant. One does not avoid using illegal drugs because one might be tested. One avoids them because drugs have a negative impact on job performance, safety and company liability. Drugs and work simply don't mix.

Grievant made a very personal appeal under oath to the arbitrator concerning a personal/family problem which caused this one time lapse in drug usage. The arbitrator found this testimony creditable. If the arbitrator was misled by the grievant, the arbitrator is confident that the grievant will make another misstep with drug use and be caught. The remedy provided here will assure that the company and union will not be required to use arbitration again for this grievant where drugs are involved.

In the counseling resulting from this award, grievant is urged to handle both the personal/family problems along with the drug use problem.

Based on this discussion and opinion, the following award is made:

Award

The grievance is sustained and the grievant is returned to work on October 20, 1997 under the following conditions:

1. No back pay for any loss during this suspension.

2. The award by Arbitrator Ross in CAS No. 93-17-96-472 is reinstated.

3. Grievant will reimburse the company and the union for the arbitrators' bills in both the Ross case and the instant case.

4. Grievant will provide the union and company with a signed, undated letter of resignation which the company may date and accept if grievant tests positive for any illegal drug in the next five years.

5. During the grievant's suspension period, grievant's name shall remain in the company's random drug testing program. If grievant fails to take a required test during his suspension, the company can date and accept his resignation letter.

6. The company and union may agree that unusual or unforeseen circumstances justify waiving any conditions set forth above.

/s/ Jerome T. Barrett
JEROME T. BARRETT
Arbitrator
Falls Church, Virginia

Dated: August 1, 1997

APPENDIX E

REGULATORY PROVISIONS INVOLVED

Selected portions of Title 49 of the Code of Federal Regulations

PART 382—CONTROLLED SUBSTANCES AND ALCOHOL USE AND TESTING

§ 382.101 Purpose.

The purpose of this part is to establish programs designed to help prevent accidents and injuries resulting from the misuse of alcohol or use of controlled substances by drivers of commercial motor vehicles.

§ 382.103 Applicability.

(a) This part applies to every person and to all employers of such persons who operate a commercial motor vehicle in commerce in any State, and is subject to:

(1) The commercial driver's license requirements of part 383 of this subchapter;

(2) The Licencia Federal de Conductor (Mexico) requirements; or

(3) The commercial driver's license requirements of the Canadian National Safety Code.

* * * *

§ 382.201 Alcohol concentration.

No driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions while having an alcohol concentration of 0.04 or greater. No employer having actual knowledge that a driver has an alcohol concentration of 0.04 or greater shall permit the

driver to perform or continue to perform safety-sensitive functions.

§ 382.205 On-duty use.

No driver shall use alcohol while performing safety-sensitive functions. No employer having actual knowledge that a driver is using alcohol while performing safety-sensitive functions shall permit the driver to perform or continue to perform safety-sensitive functions.

§ 382.207 Pre-duty use.

No driver shall perform safety-sensitive functions within four hours after using alcohol. No employer having actual knowledge that a driver has used alcohol within four hours shall permit a driver to perform or continue to perform safety-sensitive functions.

§ 382.209 Use following an accident.

No driver required to take a post-accident alcohol test under § 382.303 of this part shall use alcohol for eight hours following the accident, or until he/she undergoes a post-accident alcohol test, whichever occurs first.

§ 382.211 Refusal to submit to a required alcohol or controlled substances test.

No driver shall refuse to submit to a post-accident alcohol or controlled substances test required under § 382.303, a random alcohol or controlled substances test required under § 382.305, a reasonable suspicion alcohol or controlled substances test required under § 382.307, or a follow-up alcohol or controlled substances test required under § 382.311. No employer shall permit a driver who refuses to submit to such tests to perform or continue to perform safety-sensitive functions.

§ 382.213 Controlled substances use.

(a) No driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions when the driver uses any controlled substance, except when the use is pursuant to the instructions of a licensed medical practitioner, as defined in § 382.107 of this part, who has advised the driver that the substance will not adversely affect the driver's ability to safely operate a commercial motor vehicle.

(b) No employer having actual knowledge that a driver has used a controlled substance shall permit the driver to perform or continue to perform a safety-sensitive function.

(c) An employer may require a driver to inform the employer of any therapeutic drug use.

§ 382.215 Controlled substances testing.

No driver shall report for duty, remain on duty or perform a safety-sensitive function, if the driver tests positive for controlled substances. No employer having actual knowledge that a driver has tested positive for controlled substances shall permit the driver to perform or continue to perform safety-sensitive functions.

§ 382.301 Pre-employment testing.

(a) Prior to the first time a driver performs safety-sensitive functions for an employer, the driver shall undergo testing for alcohol and controlled substances as a condition prior to being used, unless the employer uses the exception in paragraphs (c) and (d) of this section. No employer shall allow a driver, who the employer intends to hire or use, to perform safety-sensitive functions unless the driver has been administered an alcohol test with a result indicating an alcohol concentration less than 0.04,

and has received a controlled substances test result from the MRO indicating a verified negative test result. If a pre-employment alcohol test result under this section indicates an alcohol content of 0.02 or greater but less than 0.04, the provision of § 382.505 shall apply.

* * * *

§ 382.305 Random testing.

(a) Every employer shall comply with the requirements of this section. Every driver shall submit to random alcohol and controlled substance testing as required in this section.

(b)(1) Except as provided in paragraphs (c) through (e) of this section, the minimum annual percentage rate for random alcohol testing shall be 25 percent of the average number of driver positions.

(2) Except as provided in paragraphs (f) through (h) of this section, the minimum annual percentage rate for random controlled substances testing shall be 50 percent of the average number of driver positions.

* * * *

(i) The selection of drivers for random alcohol and controlled substances testing shall be made by a scientifically valid method, such as a random number table or a computer-based random number generator that is matched with drivers' Social Security numbers, payroll identification numbers, or other comparable identifying numbers. Under the selection process used, each driver shall have an equal chance of being tested each time selections are made.

(j) The employer shall randomly select a sufficient number of drivers for testing during each calendar year to equal an annual rate not less than the minimum annual percentage rate for random alcohol and controlled sub-

stances testing determined by the FHWA Administrator. If the employer conducts random testing for alcohol and/or controlled substances through a consortium, the number of drivers to be tested may be calculated for each individual employer or may be based on the total number of drivers covered by the consortium who are subject to random alcohol and/or controlled substances testing at the same minimum annual percentage rate under this part or any DOT alcohol or controlled substances random testing rule.

(k) Each employer shall ensure that random alcohol and controlled substances tests conducted under this part are unannounced and that the dates for administering random alcohol and controlled substances tests are spread reasonably throughout the calendar year.

(l) Each employer shall require that each driver who is notified of selection for random alcohol and/or controlled substances testing proceeds to the test site immediately; provided, however, that if the driver is performing a safety-sensitive function, other than driving a commercial motor vehicle, at the time of notification, the employer shall instead ensure that the driver ceases to perform the safety-sensitive function and proceeds to the testing site as soon as possible.

(m) A driver shall only be tested for alcohol while the driver is performing safety-sensitive functions, just before the driver is to perform safety-sensitive functions, or just after the driver has ceased performing such functions.

(n) If a given driver is subject to random alcohol or controlled substances testing under the random alcohol or controlled substances testing rules of more than one DOT agency for the same employer, the driver shall be subject to random alcohol and/or controlled substances testing at the annual percentage rate established for the calendar

year by the DOT agency regulating more than 50 percent of the driver's function.

(o) If an employer is required to conduct random alcohol or controlled substances testing under the alcohol or controlled substances testing rules of more than one DOT agency, the employer may—

(1) Establish separate pools for random selection, with each pool containing the DOT-covered employees who are subject to testing at the same required minimum annual percentage rate; or

(2) Randomly select such employees for testing at the highest minimum annual percentage rate established for the calendar year by any DOT agency to which the employer is subject.

§ 382.307 Reasonable suspicion testing.

(a) An employer shall require a driver to submit to an alcohol test when the employer has reasonable suspicion to believe that the driver has violated the prohibitions of subpart B of this part concerning alcohol. The employer's determination that reasonable suspicion exists to require the driver to undergo an alcohol test must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the driver.

(b) An employer shall require a driver to submit to a controlled substances test when the employer has reasonable suspicion to believe that the driver has violated the prohibitions of subpart B of this part concerning controlled substances. The employer's determination that reasonable suspicion exists to require the driver to undergo a controlled substances test must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the driver.

The observations may include indications of the chronic and withdrawal effects of controlled substances.

(c) The required observations for alcohol and/or controlled substances reasonable suspicion testing shall be made by a supervisor or company official who is trained in accordance with § 382.603 of this part. The person who makes the determination that reasonable suspicion exists to conduct an alcohol test shall not conduct the alcohol test of the driver.

(d) Alcohol testing is authorized by this section only if the observations required by paragraph (a) of this section are made during, just preceding, or just after the period of the work day that the driver is required to be in compliance with this part. A driver may be directed by the employer to only undergo reasonable suspicion testing while the driver is performing safety-sensitive functions, just before the driver is to perform safety-sensitive functions, or just after the driver has ceased performing such functions.

(e)(1) If an alcohol test required by this section is not administered within two hours following the determination under paragraph (a) of this section, the employer shall prepare and maintain on file a record stating the reasons the alcohol test was not promptly administered. If an alcohol test required by this section is not administered within eight hours following the determination under paragraph (a) of this section, the employer shall cease attempts to administer an alcohol test and shall state in the record the reasons for not administering the test.

(2) For the years stated in this paragraph, employers who submit MIS reports shall submit to the FHWA each record of a test required by this section that is not completed within 8 hours. The employer's records of tests that could not be completed within 8 hours shall be sub-

mitted to the FHWA by March 15, 1996; March 15, 1997; and March 15, 1998; for calendar years 1995, 1996, and 1997, respectively. Employers shall append these records to their MIS submissions. Each record shall include the following information:

(i) Type of test (reasonable suspicion/post-accident);

(ii) Triggering event (including date, time, and location);

(iii) Reason(s) test could not be completed within 8 hours; and

(iv) If blood alcohol testing could have been completed within eight hours, the name, address, and telephone number of the testing site where blood testing could have occurred.

(3) Records of tests that could not be completed in eight hours shall be submitted to the FHWA at the following address: Attn.: Alcohol Testing program, Office of Motor Carrier Research and Standards (MSC-1), Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590.

(4) Notwithstanding the absence of a reasonable suspicion alcohol test under this section, no driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions while the driver is under the influence of or impaired by alcohol, as shown by the behavioral, speech, and performance indicators of alcohol misuse, nor shall an employer permit the driver to perform or continue to perform safety-sensitive functions, until:

(i) An alcohol test is administered and the driver's alcohol concentration measures less than 0.02; or

(ii) Twenty four hours have elapsed following the determination under paragraph (a) of this section that there

is reasonable suspicion to believe that the driver has violated the prohibitions in this part concerning the use of alcohol.

(5) Except as provided in paragraph (e)(2) of this section, no employer shall take any action under this part against a driver based solely on the driver's behavior and appearance, with respect to alcohol use, in the absence of an alcohol test. This does not prohibit an employer with independent authority of this part from taking any action otherwise consistent with law.

(f) A written record shall be made of the observations leading to a controlled substance reasonable suspicion test, and signed by the supervisor or company official who made the observations, within 24 hours of the observed behavior or before the results of the controlled substances test are released, whichever is earlier.

§ 382.309 Return-to-duty testing.

(a) Each employer shall ensure that before a driver returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited by subpart B of this part concerning alcohol, the driver shall undergo a return-to-duty alcohol test with a result indicating an alcohol concentration of less than 0.02.

(b) Each employer shall ensure that before a driver returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited by subpart B of this part concerning controlled substances, the driver shall undergo a return-to-duty controlled substances test with a result indicating a verified negative result for controlled substances use.

§ 382.311 Follow-up testing.

(a) Following a determination under § 382.605(b) that a driver is in need of assistance in resolving problems

associated with alcohol misuse and/or use of controlled substances, each employer shall ensure that the driver is subject to unannounced follow-up alcohol and/or controlled substances testing as directed by a substance abuse professional in accordance with the provisions of § 382.605(c)(2)(ii).

(b) Follow-up alcohol testing shall be conducted only when the driver is performing safety-sensitive functions, just before the driver is to perform safety-sensitive functions, or just after the driver has ceased performing safety-sensitive functions.

* * * *

§ 382.501 Removal from safety-sensitive function.

(a) Except as provided in subpart F of this part, no driver shall perform safety-sensitive functions, including driving a commercial motor vehicle, if the driver has engaged in conduct prohibited by subpart B of this part or an alcohol or controlled substances rule of another DOT agency.

(b) No employer shall permit any driver to perform safety-sensitive functions, including driving a commercial motor vehicle, if the employer has determined that the driver has violated this section.

(c) For purposes of this subpart, commercial motor vehicle means a commercial motor vehicle in commerce as defined in § 382.107, and a commercial motor vehicle in interstate commerce as defined in Part 390 of this subchapter.

§ 382.503 Required evaluation and testing.

No driver who has engaged in conduct prohibited by subpart B of this part shall perform safety-sensitive func-

tions, including driving a commercial motor vehicle, unless the driver has met the requirements of § 382.605. No employer shall permit a driver who has engaged in conduct prohibited by subpart B of this part to perform safety-sensitive functions, including driving a commercial motor vehicle, unless the driver has met the requirements of § 382.605.

§ 382.505 Other alcohol-related conduct.

(a) No driver tested under the provisions of subpart C of this part who is found to have an alcohol concentration of 0.02 or greater but less than 0.04 shall perform or continue to perform safety-sensitive functions for an employer, including driving a commercial motor vehicle, nor shall an employer permit the driver to perform or continue to perform safety-sensitive functions, until the start of the driver's next regularly scheduled duty period, but not less than 24 hours following administration of the test.

(b) Except as provided in paragraph (a) of this section, no employer shall take any action under this part against a driver based solely on test results showing an alcohol concentration less than 0.04. This does not prohibit an employer with authority independent of this part from taking any action otherwise consistent with law.

§ 382.507 Penalties.

Any employer or driver who violates the requirements of this part shall be subject to the penalty provisions of 49 U.S.C. section 521(b).

Supreme Court, U.S.
FILED
FEB 18 2000
CLERK

No. 99-1038

IN THE
Supreme Court of the United States

EASTERN ASSOCIATED COAL CORPORATION,
Petitioner,

v.

UNITED MINE WORKERS OF AMERICA, DISTRICT 17;
LOCAL 1503, UNITED MINE WORKERS OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

GRANT CRANDALL *
JUDITH RIVLIN
UNITED MINE WORKERS OF AMERICA
8315 Lee Highway
Fairfax, VA 22031
(703) 208-7180

* *Counsel of Record*

CHARLES F. DONNELLY
DONNELLY & CARBONE
No. 8 Capitol Street, Suite 300
Post Office Box 152
Charleston, WV 25321
(304) 342-3650

Counsel for Respondents

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the courts below properly applied the standards contained in *United Paperworkers v. Misco, Inc.*, 484 U.S. 29 (1987), in determining that the recognized public policy against the performance of safety sensitive jobs while impaired was not violated in affirming an arbitration award reinstating an employee who tested positive for cannabinoids in a randomly scheduled drug test.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

CERTIORARI IS NOT WARRANTED 4

A. Labor Arbitration is the Established Mechanism Designed to Avoid Labor Strife 5

B. The Public Policy Exception to Arbitral Finality Is Narrowly Construed 8

C. Post-Misco Cases Do No Reflect an Irreconcilable Split 10

CONCLUSION 18

APPENDIX 1a

TABLE OF AUTHORITIES

CASES **Page**

Transportation Union (CT&Y), 175 F.3d 355 (5th Cir.
Alvey, Inc. v. Teamsters Local 688, 132 F.3d 1209
(8th Cir. 1997)..... 16
*American Postal Workers Union, Milwaukee Local v.
Runyon*, 185 F.3d 832 (7th Cir.1999) 11
*Atchison, Topeka and Santa Fe. Railroad Co. v.
United* 1999) 18
Boys Markets, Inc. v. Retail Clerks Union, 398 U.S.
235 (1970) 6
*Bureau of Engraving v. Graphic Communications
International Union, Local 1B*, 164 F.3d 427 (8th
Cir.) cert. denied, 120 S. Ct. 66 (1999) 11
*Coastal Oil of New England, Inc. v. Teamsters Local
25*, 134 F.3d 466 (1st Cir.1998) 12
District 17, UMWA v. Island Creek Coal Co., 179
F.3d 133 (4th Cir.1999)' 11
Exxon Shipping Co. v. Exxon Seamen's Union, 993
F.2d 357 (3rd Cir.1993) 16
Exxon Shipping Co. v. Exxon Seamen's Union, 11
F.3d 1189 (3rd Cir.1993) 16
Exxon Shipping Co. v. Exxon Seamen's Union, 73
F.3d 1287 (3rd Cir.), *cert. denied*, 517 U.S.
1251(1996)..... 17
Exxon Corp. v. Esso Workers Union Inc., 118 F.3d
841 (1st Cir. 1997)..... 15, 16
*General Truck Drivers Local 957 v. Dayton
Newspapers, Inc.*, 190 F.3d 434 (6th Cir.1999) *cert.
denied*, 68 U.S.L.W. 3479 (U.S. 2000)..... 11

Gulf Coast Indus. Workers Union v. Exxon Corporation, 991 F.2d 244 (5th Cir.), *cert denied*, 510 U.S. 965 (1993) 17
IBEW, Local 97 v. Niagara Mohawk Corp., 143 F.3d 704 (2d Cir.1998) 16, 17
IMC-Agrico Co. v. International Chemical Workers Council, UFCW, 171 F.3d 1322 (11th Cir. 1999) 11
IUOE Local 351 v. Cooper Natural Resources, Inc., 163 F.3d 916 (5th Cir.) *cert. denied*, 120 S. Ct. 45 (1999) 11
International Brotherhood of Teamsters v. Oliver, 358 U.S. 283 (1959) 5
Kennecott Utah Copper Corp. v. Becker, 195 F.3d 1201 (10th Cir. 1999) 15
Line Drivers Local 81 v. Roadway Express, Inc., 152 F.3d 1098 (9th Cir.1998) 12
Madison Hotel v. HERE Local 25, 144 F.3d 855 (D.C. Cir. 1998) (*en banc*) 12
Michigan Regional Medical Center v. SEIU Local 79, 183 F.3d 497(6th Cir.1999)... 12
Muschany v. United States, 324 U.S. 49 (1945) 8
Phelps Dodge Corp v. National Labor Relations Board, 313 U.S. 177 (1941) 5
Rock-Tenn Co. v. United Paperworkers, 184 F.3d 330, (4th Cir.1999) 11
S.D. Warren Co. v. Paperworkers Local 1069, 845 F.2d 3 (1st Cir. 1988) 18
Teamsters Union, Local 174 v. Lucas Flour Co., 369 U.S. (1962) 6
Teamsters Local 175 v. Thomas & Betts Corp., 183 F.3d 468 (6th Cir.1999) 11
Tennessee Valley Authority v. Tennessee Valley Trades and Labor Council, 184 F.3d 510 (6th Cir. 1999) 15, 17
Textile Workers Union v. Lincoln Mills of Alabama, 353 U.S. 448 (1957) 5

United Food and Commercial Workers District Local 540 v. Pilgrim's Pride, 193 F.3d 328 (5th Cir.1999) 12
United Paperworkers v. Misco, Inc., 484 U.S. 29 (1987) ..... *passim*
United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) 6, 7
United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960) 6, 7
W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757 (1983) 7,8
Westvaco Corp. v. Paperworkers Local 676, 171 F.3d 971 (4th Cir.1999) 13

STATUTORY PROVISIONS

29 U.S.C. § 173(d) 6

STATEMENT OF THE CASE

The United Mine Workers of America ("UMWA") and Eastern Associated ("EACC") are parties to a collective bargaining agreement. The agreement includes a grievance and arbitration procedure and the requirement that no employee may be disciplined or discharged, except for "just cause".[1]

EACC implemented a Drug and Alcohol Policy ("Policy"). Consistent with Department of Transportation ("DOT") regulations, the Policy includes random drug testing for its Mobile Equipment Operators ("MEO"). James Smith, a MEO, was subjected to random drug testing. He tested positive for cannabinoids on March 26, 1996. EACC discharged Smith, and the UMWA filed a grievance that went to arbitration. After a hearing at which both sides adduced evidence, the arbitrator issued an award reducing the penalty from discharge to a 30-day suspension, without pay, and requiring that Smith both participate in a substance abuse program and submit to

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[1] Article XXIV, Section (a) of the parties' collective bargaining agreement provides:

> No employee covered by this Agreement may be disciplined or discharged except for just cause. The burden shall be on the Employer to establish grounds for discharge in all proceedings under this Agreement.

random testing that either EACC or an approved substance abuse professional would request during the next five years. Smith took four random drug tests over the ensuing nine months, and tested negative in each instance.[2] On his fifth test, however, on June 27, 1997, he tested positive for cannabinoids. He was never accused of possessing or being under the influence of drugs while working for EACC.

EACC dismissed Smith, and the Union grieved. The matter was submitted to Arbitrator Jerome T. Barrett for resolution, and his decision gives rise to the instant dispute. He was asked to resolve the issues of: whether the June 1997 dismissal was for just cause, and if not, what constitutes an appropriate remedy? Pet. App. at 8a. After conducting an evidentiary hearing, Arbitrator Barrett found there was just cause to discipline Smith, but not to discharge him. Pet. App. at 10a-11a.

EACC sought to vacate Arbitrator Barrett's decision and the Union cross-petitioned to enforce it in the United States District Court for the Southern District of West Virginia. On summary judgment, the district court enforced the decision. In so doing, Judge Copenhaver

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[2] The district court recited the dates of three random drug tests for which Smith tested negative. Pet. App. at 7a. The arbitrator's recitation of the facts, however, revealed that Smith produced negative results in four random drug tests. Pet. App. at 26a.

found that the arbitrator's decision was "rationally inferable" from the collective bargaining agreement. Pet. App. at 16a. The court rejected EACC's effort to set aside the award on public policy grounds. It found that while there exists "a well-defined and dominant public policy ... against the use of controlled substances by those who perform safety sensitive jobs", there was no need to vacate the award because the applicable DOT regulations "do not express an explicit, well-defined public policy permanently enjoining the employment of commercial motor vehicle drivers who test positive for drug use. Specifically, the Department of Transportation regulations do not require that employees who test positive for drug use be automatically discharged." Pet. App. at 20a. The court thus concluded that the arbitrator's award was consistent with the DOT regulations. In addition, the court recognized Arbitrator Barrett's interpretation of the collective bargaining agreement's substance abuse policy "to allow for suspension and discipline ... and does not call for mandatory discharge". Pet. App. at 16a. In upholding the award, the court acknowledged the First Circuit's position that an employee's positive test, alone, can be sufficient to deny reinstatement even if the employee is not shown to be under the influence of drugs while at work. The court disagreed, however, that public policy automatically mandates the discharge of employees who test positive. Contrary to the petition for a writ of certiorari, the district court did <u>not</u> determine "that an award is contrary to public policy only when it would require illegal conduct on the part of the employer". Pet.

at 3.

On review, a panel consisting of Judges Widener, Ervin and Wilkins determined that the district court correctly decided the issues before it. The Fourth Circuit thus affirmed the district court's ruling in a *per curiam* decision. The Fourth Circuit subsequently denied EACC's petition for rehearing and rehearing *en banc*.

CERTIORARI IS NOT WARRANTED

In its petition, EACC invites the Court to reexamine an area of settled federal labor law under the guise of an ostensible fracture among the lower courts. Seizing on a variance in the outcome of several cases involving challenges to labor arbitration awards on grounds of violation of public policy, EACC posits that an irreconcilable conflict exists below that compels this Court to accept review. However, there is no disagreement among the courts on the pertinent issue of public policy. Indeed, the courts have consistently recognized the public policy against the performance of safety sensitive jobs by those impaired by drugs. Moreover, although the outcomes in particular cases may differ, the decisions below reflect the normal variance manifest in the rulings of the federal courts uniformly applying the teachings of this Court. All of the circuit courts recognize the controlling standards articulated by this Court in *United Paperworkers v. Misco, Inc.,* 484 U.S. 29 (1987), as well as the continued vitality of the principles embraced in that

ruling. As we show below, the fact of differing results obtained in the courts below does not warrant review by this Court.

A. Labor Arbitration is the Established Mechanism Designed to Avoid Labor Strife.

In order to place the pending request for review in the appropriate context, it is necessary to revisit the policies animating the system of labor relations created by Congress. The promotion of industrial peace through collective bargaining is the fundamental congressional policy that lies at the heart of federal labor law. *Phelps Dodge Corp v. National Labor Relations Board*, 313 U.S. 177, 185 (1941) (Fundamental principle of federal labor legislation is "attainment of industrial peace."); *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448, 455 (1957) ("Plainly the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike... federal courts should enforce these agreements... and industrial peace can be best obtained only in that way"); *International Brotherhood of Teamsters v. Oliver*, 358 U.S. 283, 295 (1959)("the goal of federal labor policy... is... to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations, and to thereby minimize industrial strife").

Having formulated a national policy promoting

collective bargaining, Congress was cognizant of the fact that this process does not conclude upon the completion of contract negotiations. Instead, Congress recognized that disputes arising during the administration of labor contracts were inevitable and that such disputes could potentially lead to strikes, slowdowns or lockouts. *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 249 (1970). In order to avoid labor strife, Congress weaved into the fabric of national labor policy the promotion of "arbitral process as a substitute for economic warfare." *Teamsters Union Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 105 (1962). This policy was made express in Section 203(d) of the Labor Management Relations Act, 29 U.S.C. § 173 (d) . It provides that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." As this Court noted in *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 578 (1960), "[a] major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement....[A]rbitration is substitute for industrial strife....[and] is part and parcel of the collective bargaining process itself." *See also United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960) (stating that arbitrators serve "as indispensable agencies in [the] continuous collective bargaining process").

Encouragement of arbitration is, therefore, a central

theme of national labor policy, as it allows labor disputes to be resolved under the "rule of law" rather than "leaving each and every matter subject to a temporary resolution dependent solely upon the relative strength, at any given moment of the contending forces." *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 580 (1960). Thus, unlike commercial arbitration that is grounded in a policy of litigation avoidance, *id.* at 578, labor arbitration is intended to preclude workplace unrest and strife. *Id.* at 578, 580.

In order to effectuate this national labor policy of private dispute resolution, the role of the federal judiciary has been circumscribed. In keeping with the broad deference accorded arbitration rulings, this Court has instructed that as long as an arbitration award "draws its essence from the collective bargaining agreement," a reviewing court must enforce the ruling. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). In this regard, the Court is mindful of the fact that "[i]t is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *Id.* at 599. *See W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 764 (1983). Such determination does not allow review of the merits of such rulings. Instead, "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced

he committed serious error does not suffice to overturn his decision." *United Paperworkers v. Misco, Inc.*, 484 U.S. 29, 38 (1987). Similarly, the remedies crafted by an arbitrator to cure contract violations are entitled to the same degree of judicial deference as the arbitrator's factual findings and contract interpretations. "[W]here it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect. If the courts were free to intervene on these grounds, the speedy resolution of grievances by private mechanisms would be greatly undermined." *Misco*, 484 U.S. at 38.

B. The Public Policy Exception to Arbitral Finality is Narrowly Construed

Although this Court has embraced and protected the deference accorded labor arbitral rulings and remedies, it has recognized that a labor agreement may violate tenets of public policy and that, as such, it may not be enforced regardless of an arbitration award. The tension between these competing interests was examined in *W.R. Grace* and again in *Misco*. In *W.R. Grace*, this Court recognized the major premise that a court may refuse to enforce an agreement or award that violates public policy. It also took pains, however, to emphasize that it did not envision or sanction a judicial mechanism whereby courts could intrude upon the labor arbitration system under "general considerations of public interests". 461 U.S. at 766,

(quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)). This policy was subsequently reexamined and reaffirmed in *Misco*.

Indeed, in *Misco*, the Court explained that *W. R. Grace* established that the judiciary could properly vacate a labor arbitration award only if the "specific terms contained in [the parties'] agreement violate public policy". *Misco*, 484 U.S. at 43. *Misco* involved an arbitration award reinstating an employee even though he worked on a dangerous machine and had been found on company property in a car with a burning marijuana cigarette. *Id.* at 33-34. The company sought to vacate the arbitration award on several grounds, including that to reinstate an employee who had possessed marijuana on company property was contrary to public policy. *Id.* at 34. The district court found merit to the public policy concerns and vacated the arbitrator's decision. *Id.* at 34-35. The court of appeals affirmed, ruling that reinstatement would violate the public policy "against the operation of dangerous machinery by persons under the influence of drugs or alcohol." *Id.* at 35, (quoting 768 F.2d 739, 743 (5th Cir. 1985)).

This Court granted review in *Misco* because the lower courts were divided at that time about when arbitration decisions could properly be set aside based on public policy concerns. In reversing the court of appeals, this Court expressly did not "sanction a broad judicial power to set aside arbitration awards as against public

policy." *Misco,* 484 U.S. at 43. Rather, when asked to vacate labor arbitration decisions based on public policy concerns, it directed that lower courts determine if the public policy at issue is "well-defined and dominant," *id.* at 44, and, if so, the "violation of such a policy must be clearly shown if an award is not to be enforced." *Id.* at 43. In *Misco*, the Court found that the court of appeals had not properly set out the public policy at issue. "The Court of Appeals made no attempt to review existing laws and legal precedents in order to determine that they establish a "well-defined and dominant" policy against the operation of dangerous machinery while under the influence of drugs". *Id.* at 44. This Court further stated that irrespective of whether the public policy was properly identified, no violation was "clearly shown". *Id.* Moreover, the unanimous Court reiterated the well-established precept that a court is not at liberty to overturn an arbitration award if it disagrees with the arbitrator's factual findings, even if the court believes the factual findings to be "improvident" or "silly". 484 U.S. at 39.

C. Post-*Misco* Cases Do Not Reflect an Irreconcilable Split

Since this Court's ruling in *Misco* thirteen years ago, both employers and labor organizations have sought judicial review of hundreds of labor arbitration awards. For the most part, the courts have experienced little difficulty in adhering to the teachings evidenced in the *Steelworkers Trilogy* and confirmed in *Misco*.

Notwithstanding minor variations in articulation and approach, the courts have successfully rejected efforts to undermine the integrity of the arbitral process envisioned by Congress while at the same time vacating those awards that fail to "draw their essence" from the particular collective bargaining agreement. *See, e.g., General Truck Drivers Local 957 v. Dayton Newspapers, Inc.*, 190 F.3d 434, 435 (6th Cir.1999) *cert. denied*, 68 U.S.L.W. 3479 (U.S. 2000) (upholding arbitration award reinstating employee involved in workplace altercation); *American Postal Workers Union, Milwaukee Local v. Runyon*, 185 F.3d 832, 835 (7th Cir.1999) (upholding interest arbitration in favor of employer); *Rock-Tenn Co. v. United Paperworkers*, 184 F.3d 330, 336-37 (4th Cir.1999) (enforcing arbitration award binding employer to contract); *Teamsters Local 175 v. Thomas & Betts Corp.*, 183 F.3d 468, 472 (6th Cir.1999) (denying enforcement of reinstatement award violative of provisions of contract); *District 17, UMWA v. Island Creek Coal Co.*, 179 F.3d 133, 137 (4th Cir.1999) (denying effort to vacate award sustaining discharge of employee who participated in protest outside plant); *IMC-Agrico Co. v. International Chemical Workers Council, UFCW*, 171 F.3d 1322, 1325-26 (11th Cir.1999) (denying effort to vacate arbitration award); *Bureau of Engraving v. Graphic Communications International Union, Local 1B*, 164 F.3d 427, 430 (8th Cir.), *cert. denied*, 120 S. Ct. 66 (1999) (vacating arbitration awards granting monetary damages for missed overtime opportunities); *IUOE Local 351 v. Cooper Natural Resources, Inc.*,163 F.3d 916, 919-20 (5th Cir.),

cert. denied, 120 S. Ct. 45 (1999) (vacating arbitration award reinstating employee despite violation of last chance agreement); *Line Drivers Local 81 v. Roadway Express, Inc.*, 152 F.3d 1098, 1099 (9th Cir.1998) (upholding discharge arbitration awards); *Madison Hotel v. HERE Local 25*, 144 F.3d 855, 858-60 (D.C.Cir.1998) (*en banc*) (upholding award requiring employer to reinstate restaurant bus positions); *Coastal Oil of New England, Inc. v. Teamsters Local 25,* 134 F.3d 466, 469-70 (1st Cir.1998) (upholding arbitration award reinstating injured employee to first available position even if in another facility).

Within this class of cases seeking review of arbitration decisions, is a smaller group of cases in which issues of public policy have been raised as a basis for overturning arbitration awards. Once again, courts have experienced little difficulty in applying the methodology outlined in *Misco* in resolving such challenges. Not surprisingly, these decisions tend to turn on whether the court can ascertain, in the context of each particular case, whether there is an "explicit public policy" 484 U.S. at 44, that is "well defined and dominant". *Id.* If such a policy is present, the courts then consider whether the contested award contravenes that policy. *See, e.g., United Food and Commercial Workers District Local 540 v. Pilgrim's Pride*, 193 F.3d 328, 333 (5th Cir.1999) (enforcing arbitration award requiring employer to deduct certain union dues over employer's contention that it violated public policy embodied in National Labor Relations Act); *Michigan Regional Medical Center v. SEIU Local 79*, 183

F.3d 497, 504 (6th Cir.1999) (recognizing Michigan public policy of ensuring safe and competent nursing care but finding reinstatement award not to violate that policy); *Westvaco Corp. v. Paperworkers Local 676*, 171 F.3d 971, 976-77 (4th Cir.1999) (general public policy against sexual harassment is not sufficient to supplant labor arbitration of employee disciplinary sanctions).

A significantly more circumscribed group of cases involves challenges to arbitration awards in cases where an employee is implicated in some measure of drug use. The current matter lies within this area. In the instant matter, the lower courts adhered to this Court's teachings in *Misco*. Thus, the district court recited the general theory that courts have only limited jurisdiction to review labor arbitration awards under Section 301 of the Labor Management Relations Act. Pet. App. at 12a. Nevertheless, the district court recognized that courts must assure that an arbitrator's award draws "its essence from the contract", including an analysis of whether the arbitrator exceeded his contractual authority. Pet. App at. 12a-13a. The district court then applied the facts to this legal framework and expressly determined that the arbitrator's award was "rationally inferable" from the parties' collective bargaining agreement (*i.e.*, the award drew its essence from the parties' agreement, and the arbitrator did not exceed his contractual authority.) Pet. App. at 16a-17a.

The district court further considered EACC's

contention that the arbitrator's award should be set aside on public policy grounds under *Misco*. Pet. App. at 11a-21a. The district court considered EACC's articulation of the DOT Regulations which EACC asserted reflected a well-defined and dominant public policy against the operation of dangerous machinery by employees who test positive for drug use. Pet. App. at 18a-21a. While agreeing that there is a well-defined and dominant public policy against the use of controlled substances by employees who perform safety sensitive jobs, the district court found that the arbitrator's award did not contravene that policy. Pet. App. at 20a. Thus, the district court noted that the DOT Regulations EACC relied upon "do not require that employees who test positive for drug use be automatically discharged", Pet. App. at 20a-21a, and cited to the provisions of EACC's own internal policy that do not mandate termination. Pet. App. at 9a. After conducting its review of the award, the district court found that the arbitrator's award did not implicate the public policy exception. Pet. App. at 21a.

On appeal, the Fourth Circuit reviewed EACC's contention that the arbitrator's award did not draw its essence from the parties' collective bargaining agreement, and that it violated a public policy against the use of illegal drugs by those in safety-sensitive jobs. Pet. App. at 3a-4a. It noted, with approval, the district court's reasoning that a) neither the collective bargaining agreement nor the employer's substance abuse policy mandated the discharge of employees who have a positive drug test, and b) while

there is a public policy against the use of drugs by those in safety-sensitive jobs, "there is no such policy against the reinstatement of employees who have used illegal drugs in the past". Pet. App. at 3a-4a. Thus, both of the lower courts properly applied the *Misco* framework to review the arbitrator's award.

As noted by Petitioner, there is a divergence of approach among the courts of appeals in analyzing the sporadic challenges to arbitration awards involving employee discipline for drug use or failure of a drug test. Pet. at 8-17. EACC, however, overamplifies this divergence in its submission. Placing great reliance on the First Circuit's decision in *Exxon Corp. v. Esso Workers Union Inc.*, 118 F.3d 841 (1st Cir. 1997), Petitioner suggests a stark conflict among the courts of appeals. In *Exxon*, the First Circuit applied *Misco* and determined that there was a well defined and dominant public policy prohibiting employees from performing safety sensitive jobs while impaired. *Id.* at 848. Rather than a point of conflict, the First Circuit stands with virtually every other court, including the district court in this case and the alleged conflicting circuits, echoing the public concern "against the use of controlled substances by those who perform safety sensitive jobs." Pet. App. at 20a; *Kennecott Utah Copper Corp. v. Becker*, 195 F.3d 1201, 1205 (10th Cir. 1999) ("several courts have held that a clear public policy exists against performing safety sensitive jobs while impaired by drugs or alcohol"); *Tennessee Valley Authority v. Tennessee Valley Trades and Labor Council*,184 F.3d

510, 520 (6th Cir. 1999) (recognizing public policy against allowing impaired employees to operate vehicles); *IBEW, Local 97 v. Niagara Mohawk Corp.*, 143 F.3d 704, 718 (2d Cir.1998) ("There can be no doubt, ..., that there exists a strong public policy in favor of promoting a safe, drug free working environment in the nuclear industry); *Alvey, Inc. v. Teamsters Local 688*, 132 F.3d 1209, 1212 (8th Cir. 1997) (noting public policy of prohibiting illegal drugs in workplace). Thus there is no appreciable divergence among the courts below on this issue.

There is, however, a divergence of conclusions among the courts on whether particular arbitration awards reinstating employees violate this public policy. In *Exxon*, the First Circuit concluded that reinstatement would violate the policy irrespective of whether there was evidence of actual impairment. 118 F.3d at 850-52. In other cases cited by Petitioner, the Third Circuit has also recognized the prevalent public policy enunciated by other courts and vacated awards reinstating employees. *Exxon Shipping Co. v. Exxon Seamen's Union*, 993 F.2d 357, 364 (3rd Cir.1993) (refusing to enforce award directing reinstatement of helmsman who tested positive for drug use after his ship ran aground); *Exxon Shipping Co. v. Exxon Seamen's Union*, 11 F.3d 1189 (3rd Cir.1993) (refusing to enforce award reinstating driver who reported to work inebriated).

However, when the Third Circuit considered whether it would violate public policy to reinstate an

employee who refused to take a drug test after marijuana was found in his cabin, the court found no such prohibition. *Exxon Shipping Co. v. Exxon Seamen's Union*, 73 F.3d 1287 (3rd Cir.1996). The court reached this different conclusion because it found Exxon had not had "just cause" to administer a drug test in the first instance. 73 F.3d at 1296. Thus, the court sanctioned the employee's refusal to submit to the drug test. *Id.* In other words, it is not simply the nexus between illegal drug use and safety-sensitive employment that the court considered, but the underlying framework that requires reference to the parties' collective bargaining agreement. *Id.* at 1295-96. *See, also, Gulf Coast Indus. Workers Union v. Exxon Corporation*, 991 F.2d 244 (5th Cir.), *cert denied*, 510 U.S. 965 (1993) (refusing to reinstate an employee who tested positive for drugs); *Tennessee Valley Authority*, 184 F. 3d at 520 ("the issue is not whether grievant's conduct violated some public policy or law, but rather the award requiring reinstatement...violated some explicit public policy"); *IBEW Local 97*, 143 F.3d at 717 ("appropriate analysis of the public policy question requires that a court focus on the outcome of the arbitrator's interpretation of the contract... whether the remedy imposed can be fairly and unequivocally shown to violate a well-established public policy").

By our count, in the thirteen years since this Court's ruling in *Misco*, there have only been approximately thirty-five appellate decisions reviewing an arbitration matter involving employee discipline due to alcohol or drug use

or failure of a test for those substances. *See Appendix*. These cases, averaging about three a year, do not reflect an intolerable schism between the courts of appeals. Indeed, the First Circuit's 1997 ruling in *Exxon* was only the second time that court had an opportunity to consider this issue and the first time since 1988. *See S.D. Warren Co. v. Paperworkers Local 1069*, 845 F.2d 3 (1st Cir. 1988). The Third Circuit, another appellate court highlighted by EACC, has only considered the matter three times and its most recent ruling upheld an award reinstating an employee. *Exxon Shipping v. Exxon Seamen's Union*, , 73 F.3d 1287 (3rd Cir.), *cert. denied*, 517 U.S. 1251 (1996).

Finally, the Fifth Circuit's resolution of these cases is consistent with other circuits in following a case-by-case approach. Although it refused in 1993 to uphold an award in *Gulf Coast, supra*, it recently reached a different result last year in *Atchison, Topeka and Santa Fe. Railroad Co. v. United Transportation Union (CT&Y)*, 175 F.3d 355, 358 (5th Cir. 1999) ("even if Santa Fe is correct that there is a well defined public policy against reinstating a drug user to a safety sensitive position in the railroad industry, the [award] in this case would not violate that policy"). In sum, there is no compelling reason to grant review.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

*GRANT CRANDALL
JUDITH RIVLIN
UNITED MINE WORKERS OF AMERICA
8315 Lee Highway
Fairfax, VA 22031
(703) 208-7180
*Counsel of Record

CHARLES F. DONNELLY
DONNELLY & CARBONE
NO. 8 CAPITOL STREET, SUITE 300
POST OFFICE BOX 152
Charleston, WV 25321
(304) 342-3650
Counsel for Respondents

APPENDIX

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4. *Atchison, Topeka & Santa Fe Ry. Co. v. United Transp. Union*, 175 F.3d 355 (5th Cir. 1999).
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10. *United Transport Union v. Union Pacific Railroad Co., Inc.*, 116 F.3d 430 (9th Cir. 1997).
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14. *Exxon Corp. v. Baton Rouge Oil*, 77 F.3d 850 (5th Cir. 1996).
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17. *Building Material, Coal and Excavating Drivers and Helpers Local 247 v. Edward C. Levy Co.*, 1995 U.S.APP.LEXIS 38842 (6th Cir. 1995).
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20. *Teamsters Local 238 v. Cargill, Inc.*, 66 F.3d 988 (8th Cir. 1995).
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24. *Dixon v. Department of Transportation*, 8 F.3d 798 (Fed. Cir. 1993).
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Supreme Court, U.S.
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(4)

No. 99-1038

IN THE

Supreme Court of the United States

EASTERN ASSOCIATED COAL CORPORATION,
Petitioner,

v.

UNITED MINE WORKERS OF AMERICA, DISTRICT 17;
LOCAL 1503, UNITED MINE WORKERS OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

RONALD E. MEISBURG
HEENAN, ALTHEN & ROLES
1110 Vermont Ave., N.W.
Suite 400
Washington, D.C. 20005
(202) 887-0800

ANNA M. DAILEY
DONNA C. KELLY
HEENAN, ALTHEN & ROLES
1380 One Valley Square
P.O. Box 2549
Charleston, WV 25329
(304) 342-8960

JOHN G. ROBERTS, JR.*
DAVID G. LEITCH
H. CHRISTOPHER BARTOLOMUCCI
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

* Counsel of Record

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

12pp

TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENT	2
CONCLUSION	8

TABLE OF AUTHORITIES

CASES: Page

Association of Flight Attendants, AFL-CIO v. *Aloha Airlines, Inc.*, No. 96-15088 *et al.*, 1997 WL 257467 (9th Cir. May 14, 1997) 3
Braxton v. *United States*, 500 U.S. 344 (1991) 2
Delta Air Lines, Inc. v. *Air Line Pilots Ass'n Int'l*, 861 F.2d 665 (11th Cir. 1988), *cert. denied*, 493 U.S. 871 (1989) 3, 4
Dyno Nobel, Inc. v. *United Steel Workers of America*, 77 F. Supp. 2d 307 (N.D.N.Y. 1999) .. 5
Eaton Corp. v. *Paper, Allied-Industrial, Chem. & Energy Workers Int'l Union*, —— F. Supp. 2d ——, 1999 WL 1271867 (N.D. Ohio Dec. 17, 1999) 5
Exxon Corp. v. *Esso Workers' Union, Inc.*, 118 F.3d 841 (1st Cir. 1997) 2, 3, 4
Exxon Shipping Co. v. *Exxon Seamen's Union*, 993 F.2d 357 (3d Cir. 1993) 3, 4
Gulf Coast Indus. Workers Union v. *Exxon Corp.*, 991 F.2d 244 (5th Cir.), *cert. denied*, 510 U.S. 965 (1993) 3, 4
Interstate Brands Corp. v. *Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 135*, 909 F.2d 885 (6th Cir. 1990) 4
Kennecott Utah Copper Corp. v. *Becker*, 195 F.3d 1201 (10th Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3496 (U.S. Jan. 27, 2000) (No. 99-1268) 3, 5
Local 97, IBEW v. *Niagara Mohawk Power Corp.*, 196 F.3d 117 (2d Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3355 (U.S. Nov. 16, 1999) (No. 99-845) 3, 5
Southwest Ohio Reg. Trans. Auth. v. *Amalgamated Transit Union, Local 627*, No. C-980974, 1999 WL 1127293 (Ohio Ct. App. Dec. 10, 1999) 4
Tennessee Valley Auth. v. *Tennessee Valley Trades & Labor Council*, 184 F.3d 510 (6th Cir. 1999) .. 3

TABLE OF AUTHORITIES—Continued

	Page
Union Pacific R.R. v. *United Transp. Union*, 3 F.3d 255 (8th Cir. 1993), *cert. denied*, 510 U.S. 1072 (1994)	3
United Food & Commercial Workers Int'l Union, Local 588 v. *Foster Poultry Farms*, 74 F.3d 169 (9th Cir. 1996)	6-7
United Paperworkers Int'l Union v. *Misco, Inc.*, 484 U.S. 29 (1987)	2, 6, 7
United Transp. Union v. *Union Pacific R.R. Co.*, 116 F.3d 430 (9th Cir. 1997)	3
Westvaco Corp. v. *United Paperworkers Int'l Union*, 171 F.3d 971 (4th Cir. 1999)	4, 7
RULE:	
S. Ct. Rule 10(a)	2
OTHER:	
Andrew M. Campbell, Annotation, *Vacating on Public Policy Grounds Arbitration Awards Reinstating Discharged Employees*, 142 A.L.R. Fed. 387 (1997)	4-5

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REPLY BRIEF FOR PETITIONER

INTRODUCTION *

The Union devotes the bulk of its Brief in Opposition ("Opp.") to an extended discussion of settled principles of labor arbitration law that are not in dispute. *See* Opp. 5-13. The Union's reluctance to address the issues that *are* in dispute—and which sharply divide the courts of appeals—is understandable, for it has little to offer this Court in its effort to avoid review of the recurring and important issues presented. The Union vainly attempts to dismiss the differing outcomes reached by the courts of appeals in indistinguishable cases as a "tolerable" conflict on the first question presented, and all but ignores the second question presented—on which this Court

* Petitioner's Rule 29.6 statement appears at Pet. ii.

granted certiorari in *United Paperworkers International Union* v. *Misco, Inc.*, 484 U.S. 29 (1987). Try as it might, however, the Union simply cannot avoid the fact that the circuits are in deep conflict on both questions presented, that the conflicts will persist until they are resolved by this Court, and that the practical effect of the conflicts is to sow intolerable uncertainty and generate divergent results in an important area of labor relations law—all at the expense of the compelling public policy that jobs in which safety is a prime consideration not be placed in the hands of those who abuse illegal drugs.

ARGUMENT

1. While attempting to dismiss the deep circuit conflict, even the Union cannot bring itself to dispute that the courts below "disagreed" with the First Circuit's position in *Exxon Corp.* v. *Esso Workers' Union*, 118 F.3d 841 (1st Cir. 1997), Opp. 3, that the decisions in the circuits present a "variance in outcome," *id.* 4, that there is a "divergence of approach among the courts of appeals," *id.* at 15, and that this leads to a "divergence of conclusions" on the question whether reinstatement of those who test positive for drug use to safety sensitive positions violates public policy. *Id.* at 16. The Union's own words thus demonstrate that this case is a prime candidate for review by this Court. *See* S. Ct. Rule 10(a); *Braxton* v. *United States*, 500 U.S. 344, 347 (1991) ("principal purpose for which we use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals").

The Union contends that we have "overamplifie[d]" the split in the courts of appeals. Opp. 15. Not so. While all the circuits recognize the important public interest in avoiding illegal drug use by those in safety sensitive positions, only some find that this interest makes reinstate-

ment of those who test positive for such drug use contrary to public policy and therefore a ground for voiding an arbitration award. Thus, it is the confirmed view of five circuits that, in the words of the First Circuit in *Esso Workers' Union*, "[i]t makes no sense to construe public policy as encouraging—and in some cases mandating—employers to establish and enforce drug testing programs, yet to preclude them from taking decisive action against those employees who test positive." 118 F.3d at 850.[1] Five circuits disagree.[2] As a result, an arbitration award directing reinstatement to a safety sensitive position of an employee discharged because he tested positive for drug abuse may be vacated in Boston, Philadelphia, Houston, St. Louis, and Atlanta, but must be enforced in New York, Detroit, Los Angeles, Denver, and Baltimore—even if the affected employees work for the same company pursuant to the same collective bargaining agreement.[3] Such an entrenched conflict with such

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[1] *See, e.g., Exxon Shipping Co.* v. *Exxon Seamen's Union*, 993 F.2d 357 (3d Cir. 1993); *Gulf Coast Indus. Workers Union* v. *Exxon Corp.*, 991 F.2d 244 (5th Cir.), *cert. denied*, 510 U.S. 965 (1993); *Union Pacific R.R.* v. *United Transp. Union*, 3 F.3d 255 (8th Cir. 1993), *cert. denied*, 510 U.S. 1072 (1994); *Delta Air Lines, Inc.* v. *Air Line Pilots Ass'n Int'l*, 861 F.2d 665 (11th Cir. 1988), *cert. denied*, 493 U.S. 871 (1989).

[2] *See, e.g., Kennecott Utah Copper Corp.* v. *Becker*, 195 F.3d 1201 (10th Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3496 (U.S. Jan. 27, 2000) (No. 99-1268); *United Transp. Union* v. *Union Pacific R.R. Co.*, 116 F.3d 430 (9th Cir. 1997); *Local 97, IBEW* v. *Niagara Mohawk Power Corp.*, 196 F.3d 117 (2d Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3355 (U.S. Nov. 16, 1999) (No. 99-845); *Tennessee Valley Auth.* v. *Tennessee Valley Trades & Labor Council*, 184 F.3d 510 (6th Cir. 1999).

[3] The Court need not infer the conflict from the results or reasoning of circuit court decisions; the courts themselves have expressly recognized the split of opinion. *See, e.g., Association of Flight Attendants, AFL-CIO* v. *Aloha Airlines, Inc.*, No. 96-15088 *et al.*, 1997 WL 257467, at *3 (9th Cir. May 14, 1997) (declining

tangible consequences is intolerable, and should be resolved by this Court.

2. In addition to downplaying the conflict on the first question presented, the Union has no response to the other compelling reasons for this Court to grant review in this case. The Union does not account for the fact that this case involves a repeat offender, and that the public policy against reinstatement of those who have tested positive for drugs is even stronger where an employee has already been given a second chance. The Union ignores the fact that state appellate courts—which look to federal cases for guidance on the question—are also in conflict over the public policy question at issue here. *See* Pet. 14-15 n.3; *see also Southwest Ohio Reg. Transp. Auth.* v. *Amalgamated Transit Union, Local 627*, No. C-980974, 1999 WL 1127293 (Ohio Ct. App. Dec. 10, 1999) (reinstating bus repairman who tested positive for marijuana would violate public policy). Nor does the Union respond to our demonstration that commentators have recognized continuing confusion over the public policy exception requiring this Court's guidance. *See* Pet. 15 n.4.[4] Finally, the Union also ignores the fact that the

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invitation to "revisit our circuit's approach to the public policy exception, and to adopt the approach of other circuits by looking at whether the underlying conduct of the employees violates public policy") (citing *Gulf Coast, supra*, and *Delta Air Lines, supra*); *Esso Workers' Union, Inc.*, 118 F.3d at 850; *Exxon Shipping Co.*, 993 F.2d at 362-364; *Interstate Brands Corp.* v. *Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 135*, 909 F.2d 885, 894 n.11 (6th Cir. 1990) (noting "schism" among the circuits); *see also Westvaco Corp.* v. *United Paperworkers Int'l Union, AFL-CIO*, 171 F.3d 971, 977 (4th Cir. 1999) (recognizing conflict over reinstatement of employees who violate sexual harassment policies).

[4] *See also* Andrew M. Campbell, Annotation, *Vacating on Public Policy Grounds Arbitration Awards Reinstating Discharged Employees*, 142 A.L.R. Fed. 387, 405 (1997) (noting that some courts have "refused to vacate arbitration awards reinstating employees

confusion is not limited to the particular context at issue here, but extends to cases involving violations of safety procedures and sexual harassment. *See* Pet. 15-17 & nn. 5, 6.

Instead of confronting the breadth of the problem, the Union is content to suggest that review is not appropriate because there have been "only" 35 court of appeals decisions since *Misco* involving reinstatement of employees who test positive for drug use. Opp. 17 & Appendix. Such a recurring need for the courts of appeals to review the issue suggests not, as the Union would have it, that the issue is rare and unimportant, but rather that it will continue to arise—as indeed it has even in the brief period since the petition was filed [5]—and that the split will persist, unless this Court grants review to resolve the conflict.

Indeed, the need for this Court's review is highlighted by the fact that there are three petitions—from three different circuits—currently on the Court's docket which involve the public policy question. In addition to the petition in this case, petitions have been filed seeking the Court's review of the Second Circuit's decision in *Niagara Mohawk Power Corp.*, *see* 68 U.S.L.W. 3355 (U.S. Nov. 16, 1999) (No. 99-845), and of the Tenth Circuit's decision in *Kennecott Utah Copper Corp.*, *see* 68 U.S.L.W. 3496 (U.S. Jan. 27, 2000) (No. 99-1268). In response to all this, the Union presents only the hope that employers, employees, the courts, and the public can con-

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who have been intoxicated or under the influence of drugs who were in the same occupations as employees whose reinstatement has been vacated" by other courts).

[5] *See, e.g.*, *Eaton Corp.* v. *Paper, Allied-Industrial, Chem. & Energy Workers Int'l Union*, —— F. Supp. 2d ——, 1999 WL 1271867 (N.D. Ohio Dec. 17, 1999); *Dyno Nobel, Inc.* v. *United Steel Workers of America*, 77 F. Supp. 2d 307 (N.D.N.Y. 1999).

tinue to "tolerate" the confusion and conflict on the question presented. That hope is ill-founded; as the *amicus* brief filed by the Institute for a Drug-Free Workplace in support of the petition makes clear, there is a critical need for resolution of the question presented. The issue is ripe for resolution and should be decided by this Court.

3. The Union does not dispute that there is an entrenched circuit conflict on the second question presented —whether an arbitration award may be vacated on public policy grounds only when the award itself violates some positive law or requires unlawful conduct by the employer. Nor could it. This Court recognized the circuit conflict on that question in *Misco*, 484 U.S. at 45 n.12, and—as we demonstrated in the petition—the conflict has only deepened after *Misco* failed to resolve it. *See* Pet. 24-30.

The Union's sole response to the second question presented is *one sentence* asserting that the courts below did not take a position on that question. Opp. 3. The Union is wrong. The district court expressly found that there was no public policy that warranted vacating the arbitrator's reinstatement award because "the DOT Regulations do not *require* that employees who test positive for drug use be automatically discharged." Pet. App. 20a-21a (emphasis added). The district court held that the public policy exception to enforcement of arbitration awards could not be invoked "[b]ecause the DOT Regulations do not make it *illegal* to reinstate employees who test positive for drug use." *Id.* at 21a (emphasis added). As the court concluded: "Consequently, the public policy exception does not apply inasmuch as the arbitrator's award is consistent with the DOT Regulations." *Id.*

In reaching this conclusion, the court quoted the Ninth Circuit's decision in *United Food & Commercial Workers*

International Union, Local 588 v. *Foster Poultry Farms*, 74 F.3d 169 (9th Cir. 1996). *See* Pet. App. 21a. As we explained in the petition, Pet. 27-28, the Ninth Circuit in that case reaffirmed its pre-*Misco* position—what this Court called the "narrower view" among the conflicting circuit positions, 484 U.S. at 35 n.7—that the public policy exception to enforcement of arbitral awards cannot be invoked unless the award itself would violate the law.

The Fourth Circuit below confirmed this position in adopting the district court's reasoning as its own. Pet. App. 4a. That simply reaffirmed the position the court of appeals had adopted in *Westvaco Corp.* v. *United Paperworkers International Union*, 171 F.3d 971 (4th Cir. 1999), where it declined to vacate an arbitration award reinstating a repeat sexual harasser because it could find no law specifically barring such reinstatement. *See* Pet. 16, 28. The courts below have plainly sided with the "narrower view" on the conflict noted by this Court in *Misco*, with the Ninth and D.C. Circuits and against the First, Third, Fifth, Seventh, Eighth, and Eleventh. *See* Pet. 22-28. The Union has offered no reason this Court should not grant certiorari to resolve that conflict.

CONCLUSION

For the foregoing reasons, as well as those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

RONALD E. MEISBURG
HEENAN, ALTHEN & ROLES
1110 Vermont Ave., N.W.
Suite 400
Washington, D.C. 20005
(202) 887-0800

ANNA M. DAILEY
DONNA C. KELLY
HEENAN, ALTHEN & ROLES
1380 One Valley Square
P.O. Box 2549
Charleston, WV 25329
(304) 342-8960

JOHN G. ROBERTS, JR.*
DAVID G. LEITCH
H. CHRISTOPHER BARTOLOMUCCI
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

* Counsel of Record

Counsel for Petitioner

MOTION FILED
FEB 18 2000

(3)

MOTION FILED
FEB 18 2000

No. 99-1038

In The
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October Term, 1999

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Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE THE INSTITUTE FOR A DRUG-FREE WORKPLACE IN SUPPORT OF THE PETITIONER

DAVID A. SUTTON
Counsel of Record
MARK A. DE BERNARDO
KATHERINE A. GOETZL
LITTLER MENDELSON, P.C.
1225 I Street, N.W., Suite 1000
Washington, D.C. 20005
(202) 842-3400

Counsel for Amicus Curiae,
The Institute for a
Drug-Free Workplace

No. 99-1038

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October Term, 1999

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v.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 37.2(b) of this Court, the Institute for Legal Reform, a project of the Center for Workplace Law, respectfully moves for leave to file the attached amicus curiae brief in support of Petitioner, Eastern Associated Coal Corporation.[*] In support of its Motion, the Institute states:

The Institute is a non-profit coalition of private businesses and business organizations dedicated to

[*] Prior to filing this Motion, the Institute sought the consent of both parties to the filing of its brief, as required by Rule 37.2 of this Court. The Petitioner consented to the Institute's request. The Institute was unable to contact the Respondent, necessitating this Motion.

protecting the interests of employers and effective and responsible drug-abuse ams.

l, the Institute disseminates information to development of workplace drug-abuse treatment programs, and participates in – including public-sector legal, regulatory, orums – on the development of the law on nce-abuse prevention throughout the United itute has developed an enormous amount of urrent laws, regulations, and workplace ctices regarding substance-abuse prevention. Institute has extensive information on the failures of workplace substance-abuse hat measures have proven most effective.

believes that its *amicus curiae* participation Court in this proceeding. The Institute and ng a unique "hands-on" perspective to the the efficacy and value of meaningful drug- s. Its members have implemented such plied them to sizable portions of the nation's , thus, have substantial experience with the ctive programs. Accordingly, the Institute s have an important perspective on the critical volved in this case which the Court should

RE, the Institute for a Drug-Free Workplace quests that the Court grant its motion and the accompanying brief as an *amicus curiae* e Petitioner.

Respectfully submitted,

PETER A. SUSSER
Counsel of Record
MARK A. DE BERNARDO
KATHERINE A. GOETZL
LITTLER MENDELSON, P.C.
1225 I Street, N.W., Suite 1000
Washington, D.C. 20005
(202) 842-3400

Counsel for Amicus Curiae,
The Institute for a
Drug-Free Workplace

February 18, 2000

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS* 1

INTRODUCTION AND SUMMARY 3

ARGUMENT 5

I. PUBLIC POLICY DICTATES THAT DRUG- OR ALCOHOL-ABUSING EMPLOYEES NOT BE PERMITTED TO WORK IN SAFETY-SENSITIVE POSITIONS 5

A. The U.S. Supreme Court Has Recognized the Public Policy Against Employing Drug or Alcohol Abusers in Safety-Sensitive Positions. 6

B. The Executive and Legislative Branches of the Federal Government Have Recognized the Public Policy Against Employing Drug or Alcohol Abusers in Safety-Sensitive Positions. 7

C. State Legislatures Have Recognized the Public Policy Against Employing Drug or Alcohol Abusers in Safety-Sensitive Positions. 8

II. PROHIBITING REINSTATEMENT OF SAFETY-SENSITIVE EMPLOYEES WHO FAIL WORKPLACE DRUG TESTS IS A LOGICAL AND NECESSARY APPLICATION OF THE PUBLIC POLICY WHICH GIVES PRIORITY TO EMPLOYEE, PUBLIC, AND ENVIRONMENTAL SAFETY. 10

A. Reinstatement of Employees Who Fail Drug or Alcohol Tests Violates an Established and Appropriate Public Policy Because It Drastically Undermines Employer Efforts to Prevent the Placement of Substance Abusers in Hazardous Positions. 11

B. Employers with Effective Substance-Abuse Prevention Programs Terminate Employees Who Twice Test "Positive" for Illicit Drug Use. 14

C. Alcoholism and Drug Addiction Are Chronic Conditions for Which the Risk of Relapse Never Disappears. 15

D. Reinstatement of a Safety-Sensitive Employee Who Failed a Drug Test Sends the Wrong Message to Courts, Arbitrators, Employers, and Employees Regarding a Compelling Public Policy. 18

CONCLUSION 20

TABLE OF AUTHORITIES

FEDERAL CASES

Delta Air Lines, Inc. v. Air Line Pilots Ass'n Int'l, 861 F.2d 665 (11th Cir. 1988) 10
Eastern Associated Coal Corp. v. United Mine Workers of America, No. 98-2527, 1999 WL 635632 (4th Cir. Aug. 20, 1999) 10
Exxon Corp. v. Baton Rouge Oil & Chem. Workers Union, 77 F.3d 850 (5th Cir. 1996) 10
Exxon Corp. v. Esso Workers Union, Inc., 118 F.3d 841 (1st Cir. 1997) 10
Exxon Shipping Co. v. Exxon Seamen's Union, 11 F.3d 1189 (3d Cir. 1993) 10
IBEW, Local 97 v. Niagara Mohawk Power Corp., 143 F.3d 704 (2d Cir. 1998) 10
Kennecott Utah Copper Corp. v. Becker, 195 F.3d 1201 (10th Cir. 1999) 10
National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) 6
Newsday, Inc. v. Long Island Typographical Union, 915 F.2d 840 (2d Cir. 1990) 19
Skinner v. Railway Labor Executives' Association, 489 U.S. 602 (1989) 6
Tennessee Valley Authority v. Tennessee Valley Trades and Labor Council, 184 F.3d 510 (6th Cir. 1999) 10
Union Pacific Railroad v. United Transp. Union, 3 F.3d 255 (8th Cir. 1993) 10
United Transportation Union v. Union Pacific Railroad Co., 116 F.3d 430 (9th Cir. 1997) 10

STATE CASES

Clevenger v. Employment Security Department, 770 P.2d 866 (Nev. 1989) 9
Parro v. Industrial Commission of Illinois, 657 N.E.2d 882 (Ill. 1995)... 9
Risch v. State, 879 P.2d 358 (Alaska 1994) 9
Warren v. Employment Security Department, 724 P.2d 227 (N.M. 1986)9

FEDERAL STATUTES

29 U.S.C.A. § 654 (a)(1) (1985) 11
41 U.S.C. app. § 702(a) (1994) 7
49 U.S.C. app. § 2717 (1994) 7

STATE STATUTES

ALA. CODE § 25-4-78 (Supp. 1998) 8
ALA. CODE § 25-5-51 (1992) 9
ARIZ. REV. STAT. § 23-619.01 (1993) 8
CAL. LAB. CODE § 3600 (West 1989 & Supp. 1999) 9
CAL. UNEMP. INS. CODE § 1256.5 (West Supp. 1999) 9
FLA. STAT. ANN. § 440.09 (West 1993) 9
FLA. STAT. ANN. § 443.101 (West 1997 & Supp. 1999) 9
GA. CODE ANN. § 34-8-194 (Michie 1998) 9
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W. VA. CODE § 21A-6-3 (1996) 9
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FEDERAL REGULATIONS

10 C.F.R. Ch. III, § 707.5(a)(1) (1994) 8
10 C.F.R. Part 26 (1994) 8
14 C.F.R. Part 121, Appendices I and J (1994) 8
48 C.F.R. § 252.223-7004(c)(4)(i) (1994) 8
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Survey of 1,006 Full-Time Employees, Aged 18 and Older, Working Outside of the Home, conducted for the Institute for a Drug-Free Workplace by the Gallup Organization, Princeton, New Jersey (1995) 13
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No. 99-1038

In The
Supreme Court of the United States
October Term, 1999

EASTERN ASSOCIATED COAL CORPORATION,
Petitioner,

v.

UNITED MINE WORKERS OF AMERICA, DISTRICT 17;
LOCAL 1503, UNITED MINE WORKERS OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF *AMICUS CURIAE*, THE INSTITUTE FOR A DRUG-FREE WORKPLACE, IN SUPPORT OF THE PETITIONER

INTEREST OF THE *AMICUS*[1]

The Institute for a Drug-Free Workplace (the "Institute") is a non-profit coalition of major businesses and business organizations dedicated to promoting and protecting the interests of employers and employees in effective and

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[1] The Institute hereby certifies, in accordance with Rule 37.6 of this Court, that no counsel for a party authored this brief in whole or in part, and no person or entity, other than the Institute for a Drug-Free Workplace, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

responsible drug-abuse prevention programs. The Institute includes in its membership many of the largest employers in the United States, and a wide range of companies of all sizes, chambers of commerce, trade associations, and community coalitions.

Among other functions, the Institute disseminates information to assist employers and employees in drug-abuse prevention and treatment programs, and to positively influence the national, state, and local consideration of drug-abuse prevention issues. The Institute is uniquely situated to provide relevant and helpful information on the nature and dangers of substance abuse, and on the design and implementation of effective policies and procedures to combat those problems in the workplace, particularly where such policies promote the safety and welfare of employees, their co-workers, and the public at large.

The Institute has a significant interest in the questions presented in this case. By holding that an arbitration award reinstating an employee, who has repeatedly tested "positive" for illegal drug use, to a safety-sensitive position does *not* violate public policy, the U.S. Court of Appeals for the Fourth Circuit has failed to recognize the substantial risks that such an employee poses, the increased likelihood that his drug-related impairment could cause or contribute to an accident, and the potentially catastrophic consequences of such an accident. The decision would inappropriately and unjustifiably undermine employers' ability to provide safe workplaces, and to take necessary steps to protect life, property, and the environment.

The Institute's members have a strong interest in ensuring that the disciplinary component of their drug-free workplace policies cannot be evaded by employees who – like the employee in this case – claim to have temporarily relapsed into illegal drug use because of a "personal/family

problem." A policy of mandatory reinstatement of a safety-sensitive employee who tested "positive" for marijuana, if left undisturbed by this Court, would severely cripple the very positive deterrent effect that drug-free workplace programs have on employee substance abuse.

Many of the Institute's members – and countless other employers who are either required to, or choose to, drug test their employees – have multi-state operations. The current split between the Courts of Appeals regarding whether an arbitration award reinstating a safety-sensitive employee who has tested "positive" for illicit drug use violates public policy hinders employers' ability to enforce their drug-free workplace policies. Therefore, a definitive resolution of this issue by the Court is necessary.

INTRODUCTION AND SUMMARY

The Fourth Circuit's decision to uphold the arbitrator's award reinstating former employee James Smith ("Mr. Smith") violates the well-established public policy against allowing drug-impaired employees to work in safety-sensitive positions. As the First, Third, Fifth, Eighth, and Eleventh Circuits have recognized, prohibiting reinstatement of safety-sensitive employees who have tested "positive" for illicit drug use is a logical and necessary application of that public policy. That public policy – grounded in concerns relating to public, environmental, and workplace safety – is of overriding importance, and requires that the Fourth Circuit's decision be reversed.

Petitioner's employee, Mr. Smith, was a Mobile Equipment Operator. That position required a Commercial Driver's License, and thus Mr. Smith was subject to drug and alcohol testing under the U.S. Department of Transportation's regulations. In addition, Petitioner's drug-

free workplace policy requires all employees to submit to random drug testing. Petitioner's policy provided that a driver who tests "positive" for illegal drugs will be removed from any safety-sensitive position and subject to disciplinary action up to and including termination.

In March 1996, Mr. Smith tested "positive" for marijuana, and Petitioner suspended him with an intent to discharge him. Mr. Smith grieved Petitioner's action. An arbitrator reinstated Mr. Smith on the condition that he participate in a substance-abuse prevention program and submit to random drug testing for the following five years. Sixteen months after his first "positive" test, Mr. Smith tested "positive" for marijuana again. Petitioner suspended Mr. Smith, who grieved the impending discharge through his union, the Respondents in this case. The arbitrator reinstated Mr. Smith, finding credible his testimony that "a personal/family problem... caused this one time lapse in drug usage." Seemingly acknowledging the danger of reinstating Mr. Smith, the arbitrator noted "[i]f the arbitrator was misled by the grievant, the arbitrator is confident that the grievant will make another misstep with drug use and be caught."

Petitioner filed a lawsuit to vacate the arbitration award in the U.S. District Court for the Southern District of West Virginia, which ruled that the arbitration decision be enforced. Petitioner appealed that decision to the U.S. Court of Appeals for the Fourth Circuit, which affirmed the District Court's decision. Petitioner requested rehearing and rehearing *en banc*, which were denied.

The safety concerns that motivated the widespread adoption of workplace drug-testing policies, particularly for employees working in safety-sensitive positions, underscore a broad public policy against reinstating to safety-sensitive positions employees who have failed drug tests.

Reinstatement to a safety-sensitive position violates public policy by compromising multiple, compelling safety interests. Such a conclusion clearly violates public policy by undermining the myriad requirements that lawmakers and employers have adopted to ensure that employees who are substance abusers are not employed in these positions. Despite this well-defined public policy against reinstatement of safety-sensitive employees who have tested "positive," the Fourth Circuit upheld the reinstatement of Mr. Smith to his safety-sensitive position. If this arbitration had been held in the First, Third, Fifth, Eighth, or Eleventh Circuit, the award would have been vacated.

For these reasons, the Institute urges this Court to grant the petition for a writ of certiorari, and to reverse the decision of the Fourth Circuit.

ARGUMENT

I. PUBLIC POLICY DICTATES THAT DRUG- OR ALCOHOL-ABUSING EMPLOYEES NOT BE PERMITTED TO WORK IN SAFETY-SENSITIVE POSITIONS.

This Court, the Executive Branch, and the Legislative Branch, as well as numerous lower federal and state courts – and state legislatures that have dealt with the drug-testing issue – have articulated a consistent and forceful legal doctrine that to permit safety-sensitive employees to engage in illicit drug and alcohol use – including reporting to work with a detectable amount of drugs or alcohol in one's system – would violate public policy.

A clearly defined and dominant public policy supports the removal of potentially drug- or alcohol-impaired workers

from safety-sensitive positions. This policy has been expressed explicitly again and again through a large volume of Executive Orders, federal legislation, federal regulations, and state legislation.

A. The U.S. Supreme Court Has Recognized the Public Policy Against Employing Drug or Alcohol Abusers in Safety-Sensitive Positions.

This Court, in *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989), and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), recognized the public policy against allowing impaired employees to work in *safety-sensitive* positions – such as the position Mr. Smith held at Eastern Associated Coal Corporation.

In *Skinner*, this Court held that in light of the great potential harm that drug- or alcohol-impaired employees may cause in the railroad industry, railroad employees could be required to undergo drug and alcohol testing, despite the Constitutional prohibition against the government requiring unreasonable searches of individuals.

Similarly, in *Von Raab*, this Court held that Customs employees who carry firearms could be subject to mandatory drug testing because of the dangers associated with the possible impairment of agents in these positions.

B. The Executive and Legislative Branches of the Federal Government Have Recognized the Public Policy Against Employing Drug or Alcohol Abusers in Safety-Sensitive Positions.

The policy against employing substance abusers in safety-sensitive positions also has been incorporated into

federal law by the Executive and Legislative Branches. Executive Order 12,564, issued by President Reagan in 1986, mandated that the heads of all executive agencies of the federal government establish a drug-free workplace.

In 1988, Congress enacted the Drug-Free Workplace Act, which requires all federal contractors and grantees to establish a drug-abuse prevention program including education, counseling, and penalties for drug use. 41 U.S.C. app. § 702(a) (1994).

Congress next enacted (by wide vote margins in both the Senate and the House of Representatives) the Omnibus Transportation Employee Testing Act of 1991, 49 U.S.C. app. § 2717 (1994). Pursuant to this law, the Department of Transportation, through its five operating agencies, established mandatory substance-abuse prevention requirements for 8.1 million workers in safety-sensitive, transportation-related positions in the private sector (including, of course, Mr. Smith's position). The Federal Aviation Administration ("FAA"), the U.S. Coast Guard ("USCG"), the Federal Railroad Administration ("FRA"), the Federal Highway Administration ("FHWA"), and the Federal Transit Administration ("FTA") promulgated detailed regulations in this area, all of which reflect the fundamental policy judgment that no drug- or alcohol-impaired employees should work in safety-sensitive positions in transportation operations – and all of which require the *removal* of employees who test "positive" from such positions.[2]

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[2] *See* 14 C.F.R. Part 121, Appendices I and J (1994) (FAA); 46 C.F.R. Part 16 (1994) (USCG); 49 C.F.R. Part 219 (1995) (FRA); 49 C.F.R. Part 382 (1995) (FHWA); 49 C.F.R. Part 653 (1994) (FTA).

The Departments of Energy ("DoE") and Defense ("DoD") also have issued regulations to ensure that safety-sensitive jobs are not performed by drug abusers. DoE and DoD contractors must have programs to identify those who engage in illicit drug use, including testing of employees in sensitive positions – that is, positions that pose dangers to public health and safety. 10 C.F.R. Ch. III, § 707.5(a)(1) (1994); 48 C.F.R. § 252.223-7004(c)(4)(i) (1994).[3]

C. State Legislatures Have Recognized the Public Policy Against Employing Drug or Alcohol Abusers in Safety-Sensitive Positions.

A vast majority of the states also have recognized this public policy in one way or another. Many state legislatures have enacted statutes encouraging and rewarding employers who implement drug-free workplace policies and programs, including drug testing, by excluding substance abusers from unemployment and workers' compensation benefits.

For example, 24 state unemployment compensation statutes explicitly deny unemployment benefits to workers who were dismissed due to alcohol or drug use.[4] In the absence of an explicit statutory provision, unemployment commissions in a majority of other states faced with a

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[3] *See also* 48 C.F.R. Part 1852 (1994) (National Aeronautics and Space Administration drug-testing requirements for contractors); 10 C.F.R. Part 26 (1994) (Nuclear Regulatory Commission drug-testing requirements for nuclear plant employees).

[4] *See, e.g.*, ALA. CODE § 25-4-78 (Supp. 1998); ARIZ. REV. STAT. § 23-619.01 (1993); CAL. UNEMP. INS. CODE § 1256.5 (West Supp. 1999); FLA. STAT. ANN. § 443.101 (West 1997 & Supp. 1999); GA. CODE ANN. § 34-8-194 (Michie 1998); LA. REV. STAT. ANN. § 23:1601(10) (West Supp. 1999); VA. CODE ANN. § 60.2-618(2)(b) (Michie 1998); W. VA. CODE § 21A-6-3 (1996).

worker dismissed for drug or alcohol use also have denied claims for unemployment benefits.[5]

Similarly, 45 states have enacted explicit statutory limitations on the receipt of workers' compensation benefits by an employee who is injured due to his or her own drug or alcohol use.[6] In the absence of statutory provisions for automatic denial of benefits, state courts also have denied intoxicated and/or drug-impaired employees these benefits.[7]

While these statutes and rulings vary by state, the policy is manifestly clear in each case: employees should *not* be permitted to recover compensation when they intentionally endanger themselves and others by using drugs and alcohol.

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[5] *See, e.g., Risch v. State*, 879 P.2d 358 (Alaska 1994); *Clevenger v. Employment Security Department*, 770 P.2d 866 (Nev. 1989); *Warren v. Employment Security Department*, 724 P.2d 227 (N.M. 1986).

[6] *See, e.g.*, ALA. CODE § 25-5-51 (1992); CAL. LAB. CODE § 3600 (West 1989 & Supp. 1999); FLA. STAT. ANN. § 440.09 (West 1993); GA. CODE ANN. § 34-9-17 (1998); LA. REV. STAT. ANN. § 23:1081 (West 1998); MISS. CODE ANN. § 71-3-7 (1995); TEX. LAB. CODE ANN. §§ 406.032 & 401.013 (West 1996); VA. CODE ANN. § 65.2-306 (Michie 1995); W. VA. CODE § 23-4-2 (Supp. 1998).

[7] *See, e.g., Parro v. Industrial Commission of Illinois*, 657 N.E.2d 882 (Ill. 1995).

II. PROHIBITING REINSTATEMENT OF SAFETY-SENSITIVE EMPLOYEES WHO FAIL WORKPLACE DRUG TESTS IS A LOGICAL AND NECESSARY APPLICATION OF THE PUBLIC POLICY WHICH GIVES PRIORITY TO EMPLOYEE, PUBLIC, AND ENVIRONMENTAL SAFETY.

The First, Third, Fifth, Eighth, and Eleventh Circuits all have ruled that arbitration awards reinstating employees who have tested "positive" for illicit drug use to safety-sensitive positions violate public policy.[8] However, the Second, Fourth, Sixth, Ninth, and Tenth Circuits have reached the opposite conclusion.[9] This disagreement between the Courts of Appeals renders this issue ripe for resolution by this Court.

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[8] *See Exxon Corp. v. Esso Workers Union, Inc.*, 118 F.3d 841 (1st Cir. 1997); *Exxon Shipping Co. v. Exxon Seamen's Union*, 11 F.3d 1189 (3d Cir. 1993); *Exxon Corp. v. Baton Rouge Oil & Chem. Workers Union*, 77 F.3d 850 (5th Cir. 1996); *Union Pacific Railroad v. United Transp. Union*, 3 F.3d 255 (8th Cir. 1993); *Delta Air Lines, Inc. v. Air Line Pilots Ass'n Int'l*, 861 F.2d 665 (11th Cir. 1988).

[9] *See IBEW, Local 97 v. Niagara Mohawk Power Corp.*, 143 F.3d 704 (2d Cir. 1998); *Eastern Associated Coal Corp. v. United Mine Workers of America*, No. 98-2527, 1999 WL 635632 (4th Cir. Aug. 20, 1999); *Tennessee Valley Authority v. Tennessee Valley Trades and Labor Council*, 184 F.3d 510 (6th Cir. 1999); *United Transportation Union v. Union Pacific Railroad Co.*, 116 F.3d 430 (9th Cir. 1997); *Kennecott Utah Copper Corp. v. Becker*, 195 F.3d 1201 (10th Cir. 1999).

A. Reinstatement of Employees Who Fail Drug or Alcohol Tests Violates an Established and Appropriate Public Policy Because It Drastically Undermines Employer Efforts to Prevent the Placement of Substance Abusers in Hazardous Positions.

Employers with safety-sensitive operations hire from a population in which nearly three-quarters of America's illicit drug users are employed.[10] The U.S. Department of Health and Human Services has estimated that one out of every four Americans is directly affected by the alcohol or drug dependency of a family member, friend, or co-worker.[11]

Companies with employees who perform safety-sensitive tasks must be able to decrease the likelihood of accidents which have substantial – and sometimes tragic – human, economic, and environmental costs.

In addition, these companies have a statutory duty under the Occupational Safety and Health Act to ensure safe and healthy workplaces for all of their employees. 29 U.S.C.A. § 654 (a)(1) (1985).

Furthermore, employers are liable in tort to individuals who suffer personal injury and/or property damage as a result of an accident. When catastrophic events occur as the result of the drug or alcohol use of employees in safety-

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[10] According to the most recent government figures, 73 percent of all current illicit drug users are employed. Substance Abuse and Mental Health Services Administration, U.S. Department of Health and Human Services, *1998 National Household Survey on Drug Abuse* (August 1999).

[11] Substance Abuse and Mental Health Services Administration, U.S. Department of Health and Human Services, *1994 National Household Survey on Drug Abuse* (September 1995).

sensitive positions, the financial consequences can be staggering.

Thus, companies clearly need to be able to reduce the likelihood of accidents, not only because of the severe economic burden that the company would face in the wake of such an accident, but also because of the human suffering and harm that is a realistic threat.

Drug and alcohol use are known to substantially impact workplace safety. For example, drug-using employees were found to be 3.6 times more likely to be involved in a workplace accident than are employees who do not use drugs.[12] In addition, a Utah Power and Light study estimated that employees testing "positive" on preemployment drug tests were five times more likely to be involved in a workplace accident than those who tested "negative."[13]

Given the magnitude of the nation's drug- and alcohol-abuse problem, it would be naive to assume that employees in safety-sensitive positions do not abuse drugs or alcohol. In fact, the latest drug-test "positive" figures show otherwise: 4.8 percent of the 5.7 million employees and applicants who were tested for drugs at SmithKline Beecham laboratories in 1998 tested "positive."[14]

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[12] Thomas E. Backer, *Strategic Planning for Workplace Drug-Abuse Problems*, National Institute on Drug Abuse, at 4 (1987).

[13] Dennis Crouch, M. Birky, et al., National Institute on Drug Abuse, *A Critical Evaluation of the Utah Power and Light Company's Substance-Abuse Management Program: Absenteeism, Accidents, and Costs*, Drugs in the Workplace: Research and Evaluation Data, at 169-93 (1989).

[14] SmithKline Beecham, *SmithKline Beecham Drug Testing Index* (March 16, 1999).

Of more direct relevance and significance, out of more than 650,000 drug tests performed by that one commercial laboratory on safety-sensitive transportation workers, 3.4 percent tested "positive" for illegal drug use. That percentage indicates that *at least* 22,100 individuals in safety-sensitive jobs in the transportation industry who *knew* they were subject to periodic testing *still* tested "positive" for illicit drug use.

Furthermore, in a national survey of employees, 35 percent of full-time employees surveyed by the Gallup Organization said they had "personally seen or heard of" illicit drug use on the job, and 43 percent said that drug use in their workplace "seriously affects their ability to get the job done."[15] In addition, 59 percent agreed that alcohol abuse is a major workplace problem.

The devastating effects of alcohol- and drug-impaired employees are evident in several studies. Between 1975 and 1986, more than 50 train accidents were directly attributed to drug or alcohol abuse, resulting in 37 fatalities, 80 injuries, and more than $34 million in property damage.[16]

Other studies have documented declines in workplace accidents after substance-abuse problems were decreased or eliminated through workplace drug testing. For example, a survey of construction industry companies revealed that

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[15] *Survey of 1,006 Full-Time Employees, Aged 18 and Older, Working Outside of the Home,* conducted for the Institute for a Drug-Free Workplace by the Gallup Organization, Princeton, New Jersey (November 1995).

[16] *Battling the Enemy Within*, Time, March 17, 1986, at 52.

where substance-abuse testing was implemented, workplace accidents declined by 34 percent.[17]

Studies of workers who test "positive" for drug use establish that the costs of workplace substance abuse can be cut following implementation of substance-abuse detection programs. For example, the U.S. Post Office and the Georgia Power Company found that they could have saved $105 million and $1.7 million, respectively, by discharging employees who failed drug tests.[18]

Legislators, regulators, and employers have relied on this information and similar data in formulating policies and strategies to protect the public from these well-documented risks. If arbitrators and courts effectively mandate that a safety-sensitive employee who tests "positive" for illegal drugs *twice* should be reinstated, they will frustrate the underlying purposes of these laws, regulations, and policies, and place the public at much greater risk.

B. Employers with Effective Substance-Abuse Prevention Programs Terminate Employees Who Twice Test "Positive" for Illicit Drug Use.

For a drug-testing program to be effective, there have to be appropriate sanctions which employees *know* will result if

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[17] National Association of Plumbing-Heating-Cooling Contractors, *The Construction Industry Survey on Substance Abuse* (April 1992).

[18] United States Postal Service, Personnel Research & Development Branch, Office of Selection and Evaluation, *Preemployment Drug Testing: Associations with EAP, Disciplinary, and Medical Claims Information* (July 1992); J. Sheridan & H. Winkler, National Institute on Drug Abuse, *An Evaluation of Drug Testing in the Workplace*, Drugs in the Workplace: Research & Evaluation Data, at 195 (1989).

they violate the policy. A survey of the Institute's members found that 70 percent of the corporations *always* terminate employees for a second "positive" test.[19] In addition, a survey of the Institute's members in the oil and chemical industries found that 82 percent terminate employees for a second "positive" test, and 94 percent sometimes terminate employees for a first "positive" test.[20]

If safety-sensitive employees must be reinstated after a second "positive" drug test, their employers' drug-free workplace policies are rendered impotent. They essentially have no deterrent effect, and the detection impact is greatly reduced as a segue to rehabilitation opportunities.

Thus, the perpetuation of such a precedent would destroy the value of workplace drug-testing programs. If drug-abusing employees know they can be caught without there being adverse consequences, they would not fear being caught. Thus, the incentives to stop engaging in illicit drug abuse – or not to start – would be eviscerated.

C. Alcoholism and Drug Addiction Are Chronic Conditions for Which the Risk of Relapse Never Disappears.

Drug addiction and alcoholism are chronic diseases, and the likelihood of relapse at any given time is both real and unpredictable. Medical evidence shows that for addicted individuals who seek rehabilitative services, the recidivism rate is disturbingly high. One study of alcohol recidivism,

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[19] Institute for a Drug-Free Workplace. *"Member Survey: Corporate Drug and Alcohol Policies and Programs."* Washington, D.C. (1994).

[20] Institute for a Drug-Free Workplace. *"Oil and Chemical Industries Survey of Corporate Substance-Abuse Prevention Programs and Policies."* Washington, D.C. (1996).

for example, reported that approximately 90 percent of alcoholics are likely to experience at least one relapse over the four-year period following treatment.[21]

A good-faith attempt by highly motivated individuals to cease the use of abusive substances does not guarantee a cure: in a 15-year study of alcoholics who were able to abstain for two years, 41 percent later relapsed, many after more than a decade of abstinence.[22]

Success in overcoming drug dependency is even more elusive. A nationally representative longitudinal study of drug users showed that five years after completing rehabilitation, the treated individuals reported a 21 percent decline in the use of any illicit drug – meaning that 79 percent continued to use drugs at least at the same rate as they did before treatment.[23] Another recent study reported that approximately 55 percent of people with chemical dependency are prone to relapse at some time.[24]

While these figures demonstrate that some substance abusers may profit from treatment, they in no way support a

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[21] J.M. Polich *et al.*, Stability and Change in Drinking Patterns, The Course of Alcoholism: Four Years After Treatment 159-200 (1981).

[22] George Vaillant, M.D., *A Long-Term Follow-Up of Male Alcohol Abuse*, Archives of General Psychology, Volume 53 (March 1996).

[23] The study analyzed the success rates of in-patient, out-patient, and a variety of other types of rehabilitation programs. Office of Applied Studies, Substance Abuse and Mental Health Services Administration ("SAMHSA"), *Services Research Outcomes Study* (1998). The study is accessible through SAMHSA's web site at http://www.samhsa.gov.

[24] M. Dusoe, *The Use of Self-Efficacy Training in the Treatment of Relapse-Prone Individuals*, EAPA Exchange at 6 (February 1995).

conclusion that a former drug user who is able to return to work is cured. In short, *no one* can guarantee that an alcoholic, or a drug addict or chronic drug abuser, can abstain, will abstain, or will – or will not – relapse. Nor can one say when and under what circumstances that relapse will occur.

What treatment professionals *can* predict is that relapse: (1) is *more* likely to occur during times of heightened tension or pressure (including on-the-job stress),[25] (2) is often linked to interpersonal conflicts (which may arise away from work and of which the employer is unlikely to have knowledge),[26] and (3) is *more* likely to occur when the historically substance-abusing individual is in isolation or relative isolation (such as in a job without on-going direct supervision).[27]

Significantly, in a world where the majority of individuals with substance-abuse problems have few or no treatment options – or, at most, are offered three months of rehabilitative services – 85 percent of those treated at the highly regarded and well-funded addiction-treatment program at Phoenix House who *began* the program were unable to complete the two-year treatment.[28]

While no doctor, employee assistance professional, or counselor can *ever* determine that *any* individual is fully recovered and/or rehabilitated – nor can anyone predict or prevent a relapse with any certitude – all reach one universal conclusion: the rate of relapse *always* will be higher than the

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[25] R.L. Rogers & C.S. McMillan, Relapse Traps: How to Avoid the 12 Most Common Pitfalls In Recovery (Bantam Books 1991).

[26] A. Beck *et al.*, Cognitive Therapy of Substance Abuse (1993).

[27] *See* n.25.

[28] "*Traditional Drug Programs Face Up to Chronic Recidivism*," Washington Post (August 20, 1990).

rate of first-time addiction or alcoholism. The bottom line is irrefutable: those with a history of substance abuse pose a *much* greater risk of relapse and its attendant risks than those without such a history.[29]

The undeniable truth is that an historically addicted individual may relapse into self-destructive addictive behavior – without obvious signs or warning, at any time, even after years of sobriety or abstinence. If that individual's job includes safety-sensitive responsibilities, as Mr. Smith's job did, the consequences of a relapse could be disastrous.

D. Reinstatement of a Safety-Sensitive Employee Who Failed a Drug Test Sends the Wrong Message to Courts, Arbitrators, Employers, and Employees Regarding a Compelling Public Policy.

Reinstatement of Mr. Smith would subvert public policy, and send a jarring signal to employers that work strenuously – and successfully – to achieve the goal of a drug-free workplace, particularly in safety-sensitive environments. Rather than reinforcing the clear and dominant policy direction of government at all levels, the Fourth Circuit's holding – unless reversed – would frustrate employers' efforts to protect all at-risk parties and interests from potentially catastrophic harm. It would condone employee misconduct – illegal drug use – and undermine a very legitimate and widely accepted tool in achieving the critical social goal of drug-abuse prevention.

The ruling of the Fourth Circuit in this proceeding inappropriately subordinates the compelling interest of keeping drug abusers out of safety-sensitive positions. It would improperly insulate employee action at odds with the

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[29] *See, supra*, n.22.

goals (substance-abuse prevention) and methodology (testing and disciplinary action) widely embraced by both the public and private sectors, and would otherwise tend to perpetuate the harm which public policy seeks to avoid.[30]

Employer practices throughout the country have proven that comprehensive drug-testing and drug-abuse prevention programs with known, uniform consequences are the most effective means of preventing the potential harm that employee drug abuse can cause. The effectiveness of drug testing, however, is *severely* compromised when employees terminated for illegal drug use are reinstated. The current unpredictability – and sometimes irrationality – of arbitration decisions in this regard fundamentally undermines the effectiveness of workplace drug testing.

Clear tenets of public policy argue against allowing impaired employees and employees who test "positive" for illicit drug use to perform safety-sensitive jobs. The Institute urges the Court *not* to frustrate employers and employees in their efforts – and considerable success to date – in achieving drug-free workplaces. The Court should preserve employers' rights to have meaningful and effective drug-testing programs, and to terminate safety-sensitive employees for "positive" drug tests.

In summary, if the Fourth Circuit's decision is not reversed, drug testing will be much less effective at deterring drug abuse. There will be *more* drug abuse by employees, a substantial compromise of workplace safety, and an undermining of *most* employers' current substance-abuse prevention programs and policies. A policy which results in

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[30] *See, e.g., Newsday, Inc. v. Long Island Typographical Union*, 915 F.2d 840 (2d Cir. 1990) (arbitrator's reinstatement of employee terminated for sexual harassment vacated due to conflict with and adverse effect upon public policy interests).

more drug abuse cannot be a good thing. Protecting the rights of the "James Smiths" of our society to continue to engage in dangerous and illegal behavior, while neglecting the rights of others *not* to be endangered by the continued employment of a known, repeated drug abuser in a safety-sensitive position is the height of illogic. It is wrong. The Fourth Circuit was wrong. The U.S. Supreme Court should right this wrong.

CONCLUSION

The Institute for a Drug-Free Workplace respectfully urges the Court to grant the writ of certiorari to review the judgment below, to reverse the rulings that would require the reinstatement of Mr. Smith despite his illegal misconduct and violation of company policy – specifically, his repeated "positive" drug tests – and to recognize that his mandated reinstatement would be a clear, unnecessary, and indefensible violation of public policy.

Respectfully submitted,

PETER A. SUSSER
Counsel of Record
MARK A. DE BERNARDO
KATHERINE A. GOETZL
LITTLER MENDELSON, P.C.
1225 I Street, N.W., Suite 1000
Washington, D.C. 20005
(202) 842-3400

Counsel for Amicus Curiae,
The Institute for a
Drug-Free Workplace

February 18, 2000

(14)

No. 99-1038

Supreme Court, U.S.
FILED
JUN 0 1 2000
CLERK

IN THE

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

JOINT APPENDIX

JOHN G. ROBERTS, JR. *
DAVID G. LEITCH
H. CHRISTOPHER BARTOLOMUCCI
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

RONALD E. MEISBURG
HEENAN, ALTHEN & ROLES
1110 Vermont Avenue, N.W.
Suite 400
Washington, D.C. 20005
(202) 887-0800

ANNA M. DAILEY
DONNA C. KELLY
HEENAN, ALTHEN & ROLES
1380 One Valley Square
P.O. Box 2549
Charleston, West Virginia 25329
(304) 342-8960
Counsel for Petitioner

JOHN R. MOONEY*
RICHARD W. GIBSON
MOONEY, GREEN, GLEASON, BAKER,
GIBSON & SAINDON, P.C.
1920 L Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 783-0010

GRANT CRANDALL
JUDITH RIVLIN
UNITED MINE WORKERS OF AMERICA
8315 Lee Highway
Fairfax, Virginia 22031
(703) 208-7180
Counsel for Respondents

* Counsel of Record

PETITION FOR CERTIORARI FILED DECEMBER 17, 1999
CERTIORARI GRANTED MARCH 20, 2000

34 pp

TABLE OF CONTENTS

	Page
Docket entries from the United States District Court for the Southern District of West Virginia	1
Docket entries from the United States Court of Appeals for the Fourth Circuit	5
Complaint (filed August 18, 1997)	7
Answer and Counterclaim (filed September 4, 1997)	14
Reply to Counterclaim (filed September 24, 1997)	21
National Bituminous Coal Wage Agreement of 1993 (excerpts)	24

The appendix to the petition for certiorari contains the following material which is omitted from the Joint Appendix:

Appendix A:	Opinion of the United States Court of Appeals for the Fourth Circuit (August 20, 1999)	1a
Appendix B:	Opinion of the United States District Court for the Southern District of West Virginia (September 30, 1998)	5a
Appendix C:	Order of the United States Court of Appeals for the Fourth Circuit denying petition for rehearing and rehearing en banc (September 20, 1999)	22a
Appendix D:	Arbitration Award (August 1, 1997)	23a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
(CHARLESTON)

CIVIL DOCKET FOR CASE #: 97-CV-819

EASTERN ASSOCIATED COAL CORP.
Plaintiff,

v.

UNITED MINE WORKERS OF AMERICA, District 17, *et al*
Defendant.

Filed: 08/18/97

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
8/18/97	1	COMPLAINT Filing Fee $ 150.00 Receipt # 466 (nfs) [Entry date 08/21/97]
9/4/97	4	ANSWER to Complaint and COUNTER-CLAIM by UMWA, District 17, Local Union No. 1503 (Attorney Kevin F. Fagan) against Eastern Associated. (skh)
9/24/97	6	ANSWER/REPLY by Eastern Associated to defts' [4-2] counterclaim. (skh)
11/21/97	10	MOTION by UMWA, District 17, Local Union No. 1503 for Summary Judgment. (pdb)
11/21/97	11	MEMORANDUM by UMWA, District 17, Local Union No. 1503 in support of [10-1] motion for Summary Judgment. (pdb)
11/21/97	12	MOTION by Eastern Associated for Summary Judgment. (skh)

DATE	NO.	PROCEEDINGS
11/21/97	13	MEMORANDUM by Eastern Associated in support of [12-1] motion for Summary Judgment. (skh)
12/12/97	15	RESPONSE by Eastern Associated to defts' [10-1] motion for Summary Judgment. (skh)
12/12/97	16	RESPONSE by UMWA, District 17, Local Union No. 1503 to pltf's [13-1] memorandum in support of motion for summary judgment. (skh) [Entry date 12/15/97]
12/19/97	17	REPLY by Eastern Associated to defts' [16-1] response to pltf's [13-1] memorandum in support of its motion for summary judgment. (skh) [Entry date 12/22/97]
12/19/97	18	REPLY BRIEF by UMWA, District 17, Local Union No. 1503 to pltf's response to defts' [10-1] motion for Summary Judgment. (pdb) [Entry date 12/22/97]
9/30/98	23	MEMORANDUM ORDER denying pltf's [12-1] motion for Summary Judgment; granting defts' [10-1] motion for Summary Judgment. (signed by Judge John T. Copenhaver Jr.) (cc: attys) (pdb)
9/30/98	24	JUDGMENT ORDER denying pltf's [12-1] motion for Summary Judgment; granting defts' [10-1] motion for Summary Judgment; affirming the arbitration award of 8/1/97; dismissing this action with prejudice and striking it from the court's docket, with each party to bear their own costs, all matters in this case being resolved. (signed by Judge John T. Copenhaver Jr.) (cc: attys) (pdb)

DATE	NO.	PROCEEDINGS
10/9/98	25	NOTICE OF APPEAL by Eastern Associated Coal Corp. of [23-1] memorandum order and [24-1] judgment order entered September 30, 1998. FILING FEE $150.00; RECEIPT #3010. (skh) [Entry date 10/13/98]
10/9/98	26	MOTION by Eastern Associated for stay of judgment pending appeal. (skh) [Entry date 10/13/98]
10/9/98	27	MEMORANDUM by Eastern Associated in support of [26-1] motion for stay of judgment pending appeal. (skh) [Entry date 10/13/98]
10/21/98	29	COMBINED MEMORANDUM by UMWA, District 17, Local Union No. 1503 in opposition to pltf's [26-1] motion for stay; integrated with following entry. (pdb)
10/21/98	29	REQUEST/MOTION by UMWA, District 17, Local Union No. 1503 for immediate reinstatement of the grievant; integrated with previous entry. (pdb)
10/29/98	33	COMBINED MEMORANDUM IN REPLY by Eastern Associated to defts' [29-1] opposition to [26-1] motion for stay; integrated with following entry. (pdb)
10/29/98	33	MEMORANDUM by Eastern Associated in opposition to defts' [29-1] request/motion for immediate reinstatement; integrated with previous entry. (pdb)
11/9/98	36	REPLY/RESPONSE by UMWA, District 17, Local Union No. 1503 to pltf's [33-1] response in opposition to defts' [29-1]

DATE	NO.	PROCEEDINGS
		request/motion for immediate reinstatement of grievant. (skh)
11/9/98	38	REPLY by Eastern Associated to defts' [33-1] memorandum in opposition to pltf's [26-1] motion for stay of judgment pending appeal. (skh) [Entry date 11/10/98]
11/10/98	39	LETTER-FORM SURREPLY by UMWA, District 17, Local Union No. 1503 in support of [29-1] motion for immediate reinstatement of the grievant. (skh)
2/4/99	40	ORDER granting pltf's [26-1] motion for stay of the court's 9/30/98 judgment order; denying deft's [29-1] motion for immediate reinstatement of grievant. (signed by Judge John T. Copenhaver Jr.) (cc: attys) (skh)

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 98-2527

EASTERN ASSOCIATED COAL COMPANY
Plaintiff-Appellant,

v.

UNITED MINE WORKERS OF AMERICA, DISTRICT 17
Defendant-Appellee

LOCAL 1503, UNITED MINE WORKERS OF AMERICA
Defendant-Appellee

DOCKET ENTRIES

DATE	PROCEEDINGS
10/16/98	Civil case docketed. (ctd)
11/30/98	Brief joint appendix filed by Appellant Eastern Associated. Type of Service: PM Copies of Brief: 8 # brf pages: 32 Copies of apx: 6 # apx pages: 74 Sufficient / N]: y 2-sided copying: y [98-2527] Appellee brief due 12/30/98 for Local 1503 UMWA, for District 17 UMWA. (rhs)
12/30/98	Brief filed by Appellee District 17 UMWA, Appellee Local 1503 UMWA. Type of Service: PM Copies: 8 # brf pages: 39 Sufficient / N] : y. . . [98-2527] (rhs)
1/19/99	Reply brief filed by Appellant Eastern Associated. Type of Service: PM Copies of brief: 8 # brf pages: 19. Sufficient / N] : y. . . [98-2527] (rba)

DATE	PROCEEDINGS
5/6/99	Oral argument heard. William D. Ryan for Appellee Local 1503 UMWA, Appellee District 17 UMWA, Ronald E. Meisburg for Appellant Eastern Associated Courtroom Deputy: JPH. [98-2527] (jph)
8/20/99	Unpublished per curiam opinion filed. [98-2527] (ctd)
8/20/99	Judgment order filed. Decision: affirmed. EOD Date: 8/20/99. [98-2527] (ctd)
9/3/99	Petition filed by Appellant Eastern Associated for rehearing [3050909-1], for rehearing en banc. Number of copies filed: 20 [3050909-2] [98-2527] (ctd)
9/20/99	COURT ORDER filed denying motion for rehearing [3050909-1] EOD Date: 9/20/99., denying motion for rehearing en banc [3050909-2] EOD Date: 9/20/99. Copies to all counsel. [98-2527] (dad)
12/27/99	Supreme Court notice that petition for certiorari was filed on 12/17/99. Spct No.: 99-1038 Spct Pty 1: Eastern Assoc Coal Corp. Spct Pty 2: UMW of America, Dist 17, et al. [98-2527] (cw)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

Civil Action No. 2:97-0819

EASTERN ASSOCIATED COAL CORP.,
Plaintiff,

AND

UNITED MINE WORKERS OF AMERICA, DISTRICT 17,
AND LOCAL UNION No. 1503,
Defendant.

COMPLAINT

Plaintiff, Eastern Associated Coal Corp. ("EACC"), by counsel, for its complaint hereby alleges:

JURISDICTION AND VENUE

1. This is an action to vacate a labor arbitration award issued pursuant to the parties' collective bargaining agreement. The action arises under § 301 of the National Labor Relations Act ("Act"), as amended, 29 U.S.C. § 185, pursuant to which this Court has jurisdiction and venue.

PARTIES

2. EACC is a corporation licensed to do business in West Virginia, and is an employer engaged in commerce within the meaning of the Act, 29 U.S.C. §§ 152(2) and (7). EACC is a party to a collective bargaining agreement with the International Union, United Mine Workers of American, known as the National Bituminous Coal Wage Agreement of 1993 ("the Wage Agreement").

3. Defendant District 17, United Mine Workers of America ("District 17"), is an unincorporated association within the meaning of the Act. District 17 is bound by the Wage Agreement and is authorized to carry out the work of the UMWA, including the processing of grievances arising under the Wage Agreement. District 17 is engaged in representing and acting on behalf of its members, including employees of EACC within the jurisdiction of this Court.

4. Defendant Local Union No. 1503, United Mine Workers of America ("Local 1503"), is an unincorporated association and a labor organization within the meaning of the Act. Local 1503 is bound by the Wage Agreement and is engaged in representing its members, including employees of EACC within the jurisdiction of this Court.

STATEMENT OF FACTS

The Collective Bargaining Agreements

5. The Wage Agreement has been in full force and effect at all times material to the matters and things alleged herein, and currently remains in full force and effect.

6. Article XXIII of the Wage Agreement provides a four step grievance and arbitration procedure for the disposition of classified employee grievances, culminating in arbitration.

The Federal Drug Testing Regulations

7. As of January 1, 1996, companies which operated heavy equipment on public highways were required by the U.S. Department of Transportation to comply with certain portions of the Federal Motor Carrier Safety Regulations, 49 CFR 382.101 et seq. ("the Regulations"). Under the Regulations any person required to have a commercial driver's license ("CDL") must submit to controlled substances (drug) testing under certain circumstances. These circumstances include when an employee transfers from a position not requiring a CDL to a position requiring a CDL, 49 CFR 382.301.

The Regulations also provide for random drug testing of persons holding a position which requires a CDL, 49 CFR 382.305.

Grievant's Previous Drug Use

8. In 1996, EACC posted a notice for the position of Mobile Equipment Operator on a road crew which maintains haulage roads ("the MEO position"). Mobile Equipment Operators are required to operate equipment with gross vehicle weights of between 32,000 and 55,000 pounds on public roads and highways used by numerous other vehicles including school buses, ambulances and private vehicles. Mr. James E. Smith, an EACC employee and member of Local 1503, bid on and was awarded the MEO position. Because the MEO position requires a CDL, Mr. Smith was required pursuant to the Regulations to provide a urine specimen in accordance with the pre-employment drug testing requirement of the Regulations.

9. On March 25, 1996, Mr. Smith was tested pursuant to the Regulations. The results showed that Mr. Smith tested positive for illegal drug use. EACC suspended Mr. Smith with intent to discharge and discharged him. Mr. Smith grieved his discharge pursuant to the Wage Agreement and the case proceeded to arbitration.

10. Arbitrator Jerome H. Ross heard the case and on April 18, 1996, issued an award ("the Ross Award") returning Mr. Smith to work after a 30-day suspension with no back pay and requiring Mr. Smith to participate in a substance abuse program. In addition, the Ross Award required Mr. Smith to submit to random drug testing at the discretion of EACC or an approved "Substance Abuse Professional" for a period of five years.

Grievant's Subsequent Drug Use

11. In June, 1997, fourteen months after the Ross Award, while Mr. Smith was working as a Mobile Equipment Opera-

tor in the MEO position, Mr. Smith was randomly tested pursuant to the Regulations and the Ross Award. Again Mr. Smith tested positive for illegal drug use. Once again EACC suspended Mr. Smith with intent to discharge and discharged him.

12. As a result to this discharge, Mr. Smith again filed a grievance which was processed in accordance with the provisions of Article XXIII of the Wage Agreement. A hearing was held before Arbitrator Jerome T. Barrett on July 28, 1997. At the hearing, both District 17 and Local 1503 (collectively "the Union") and EACC were permitted to present testimony, introduce exhibits, cross-examine witnesses, and present arguments. The Union admitted that Mr. Smith failed the June, 1997 drug test, but contended that mitigating circumstances made the penalty of discharge too extreme.

13. At the conclusion of both parties' cases, Arbitrator Barrett issued an oral award, which he confirmed in a written opinion and award dated August 1, 1997 ("the Barrett Award"). A true and correct copy of the Barrett Award is attached hereto as Exhibit A.

14. In the Barrett Award, the arbitrator found that

> The record is clear that the company has made a good faith effort through its employee assistance program to rehabilitate the grievant. . . . It is understandable why the company wants to put an end to this matter by discharging grievant. The liability the company faces when an employee assigned to operate company equipment on public roads is found with drugs in his urine is very real.

(Award at p.4.)

15. Despite these findings, Arbitrator Barrett completely failed to address EACC's right to terminate an employee who fails a drug test for the second time. Arbitrator Barrett also failed to address whether EACC had "just cause" to terminate Mr. Smith.

16. Instead, Arbitrator Barrett ruled as follows:

> The grievance is sustained and the grievant is returned to work October 20, 1997 under the following conditions:
>
> 1. No back pay during this suspension.
>
> 2. The award of Arbitrator Ross in CAS No. 93-17-96-472 is reinstated.
>
> 3. Grievant will reimburse the company and union for the arbitrators' bills in both the Ross case and the instant case.
>
> 4. Grievant will provide the union and the company with a signed, undated letter of resignation which the company may date and accept if grievant tests positive for any illegal drug in the next five years.
>
> 5. During the grievant's suspension period grievant's name shall remain in the company's random drug testing program. If grievant fails to take a required test during his suspension, the company can date and accept his resignation letter.
>
> 6. The company and union may agree that unusual or unforeseen circumstances justify waiving any conditions set forth above. (Award at p. 6)

COUNT I

17. Paragraphs 1 through 16 are hereby incorporated and realleged in this Count I.

18. Clear, positive law, including the Regulations, evidence a well defined and dominant public policy against the performance of safety sensitive tasks while under the influence of drugs.

19. Because the Barrett Award refuses to allow EACC to discharge Mr. Smith for testing positive for illegal drug use while employed in the MEO position, and requires EACC to

reinstate Mr. Smith to the MEO position following Mr. Smith's having tested positive for illegal drug use, the Barrett Award violates the well-defined and dominant public policy against performance of safety-sensitive jobs while under the influence of illegal drugs.

20. Because the Barrett Award clearly violates this public policy, it does not draw its essence from the Wage Agreement and it must be vacated.

COUNT II

21. Paragraphs 1 through 16 are hereby incorporated and realleged in this Count II.

22. By failing to address "just cause" to discharge Mr. Smith as required by the Wage Agreement, the Barrett Award ignores the plain language and exceeds the authority granted to the Arbitrator under Article XXIV(d) of the Wage Agreement.

23. Because the Barrett Award ignores the plain language of Article XXIV(d) of the Wage Agreement and exceeds the Arbitrator's authority, it does not draw its essence from the Wage Agreement and, therefore, is invalid and unenforceable and must be vacated.

COUNT III

24. Paragraphs 1 through 16 are hereby incorporated and realleged in this Count III.

25. Alternatively, assuming Arbitrator Barrett did consider the issue of just cause, he found just cause existed. Upon such a finding, by the plain language of the Agreement, only discharge is appropriate. Any other result, such as the suspension and conditions of employment imposed by Arbitrator Barrett, ignores the plain language and exceeds the authority granted the Arbitrator under Article XXIV(d) of the Wage Agreement.

26. Because Arbitrator Barrett imposed conditions and a suspension which is contrary to the plain language of the Wage Agreement, his Award does not draw its essence from the Wage Agreement and is invalid and unenforceable and must be vacated.

PRAYER FOR RELIEF

WHEREFORE, Eastern prays that the Court enter an Order vacating the Award and granting Eastern such other relief as may be just and proper.

Respectfully submitted,

EASTERN ASSOCIATED
COAL CORPORATION
By Counsel

/s/ FORREST H. ROLES
Forrest H. Roles

/s/ DONNA C. KELLY
Donna C. Kelly
HEENAN, ALTHEN & ROLES
1380 One Valley Square
P.O. Box 2549
Charleston, WV 25329-2549
(304) 342-8960

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINA
AT CHARLESTON

C.A. 2:97-0819

EASTERN ASSOCIATED COAL CORP.,
Plaintiff,

v.

UNITED MINE WORKERS OF AMERICA,
DISTRICT 17 AND LOCAL UNION NO. 1503,
Defendants.

ANSWER AND COUNTERCLAIM OF DISTRICT 17, UNITED MINE WORKERS OF AMERICA AND LOCAL UNION 1503, UNITED MINE WORKERS OF AMERICA

COME NOW Defendants District 17, United Mine Workers of America, and Local Union 1503, United Mine Workers of America, (hereafter "Defendants") by the undersigned counsel, and hereby answer Plaintiff's Complaint as follows:

1. Paragraph 1 of the Complaint sets forth conclusions of law which require no response.

2. Defendants admit that Eastern Associated Coal Corporation is a corporation licensed to do business in West Virginia and is an employer engaged in commerce within the meaning of § 152(2)(7) of the Labor Management Relations Act, as amended, 29 U.S.C., §141, *et seq.* ("LMRA") and is signatory to a collective bargaining agreement with the United Mine Workers of America.

3. Defendants admit that District 17 is an unincorporated association within the meaning of the LMRA. Defendants

deny each and every allegation set forth in paragraph 3 of the Complaint that is inconsistent with the foregoing.

4. Defendants admit that Local Union 1503 is an unincorporated association within the meaning of the LMRA. Defendants deny each and every allegation set forth in paragraph 4 of the Complaint that is inconsistent with the foregoing.

5. Defendants admit that the collective bargaining agreement between the parties has the effective dates set forth therein.

6. Defendants admit that the collective bargaining agreement contains a settlement of dispute article set forth as Article XXIII of the 1993 National Bituminous Coal Wage Agreement ("1993 NBCWA").

7. Defendants have insufficient knowledge with respect to the allegations set forth in paragraph 7 of Plaintiff's Complaint and therefore deny each and every allegation set forth therein.

8. Defendants have insufficient knowledge with respect to the allegations set forth in paragraph 8 of Plaintiff's Complaint and therefore deny each and every allegation set forth therein.

9. Defendants admit only that Mr. Smith filed a grievance which proceeded to arbitration. Defendants deny each and every allegation that is inconsistent with the foregoing.

10. Defendants admit that arbitrator Jerome H. Ross issued an award reinstating the grievant. Defendants deny the remaining allegations set forth in paragraph 10 as they attempt to summarize the award rendered by Arbitrator Jerome H. Ross.

11. Defendants have insufficient knowledge with respect to the allegations set forth in paragraph 11 of Plaintiff's

Complaint and therefore deny each and every allegation set forth therein.

12. Defendants admit that Mr. Smith filed a grievance which proceeded to arbitration and that a hearing was held before Arbitrator Jerome T. Barrett on July 28, 1997 and that the parties were permitted to present testimony, introduce exhibits, cross-examine witnesses, and present arguments. Defendants deny each and every remaining allegation set forth in paragraph 12 of Plaintiff's Complaint.

13. Defendants admit only that the award of Arbitrator Jerome T. Barrett speaks for itself.

14. Defendants deny the allegations set forth in paragraph 14 as they seek to summarize the arbitration award of Arbitrator Jerome T. Barrett.

15. Defendants deny each and every allegation set forth in paragraph 15 of Plaintiff's Complaint.

16. Defendants deny each and every allegation set forth in paragraph 16 of Plaintiff's Complaint as it attempts to summarize the arbitration award of Arbitrator Jerome T. Barrett.

17. Defendants deny each and every allegation set forth in paragraph 17 of Plaintiff's Complaint.

18. Defendants deny each and every allegation set forth in paragraph 18 of Plaintiff's Complaint.

19. Defendants deny each and every allegation set forth in paragraph 19 of Plaintiff's Complaint.

20. Defendants deny each and every allegation set forth in paragraph 20 of Plaintiff's Complaint.

21. Defendants deny each and every allegation set forth in paragraph 21 of Plaintiff's Complaint.

22. Defendants deny each and every allegation set forth in paragraph 22 of Plaintiff's Complaint.

23. Defendants deny each and every allegation set forth in paragraph 23 of Plaintiff's Complaint.

24. Defendants deny each and every allegation set forth in paragraph 24 of Plaintiff's Complaint.

25. Defendants deny each and every allegation set forth in paragraph 25 of Plaintiff's Complaint.

26. Defendants deny each and every allegation set forth in paragraph 26 of Plaintiff's Complaint.

AFFIRMATIVE DEFENSES

1. The Complaint must be dismissed because it fails to state a claim upon which relief can be granted.

2. The Court lacks jurisdiction to vacate the arbitration award at issue because the parties have agreed to final and binding arbitration as the sole means of resolving disputes arising under the 1993 NBCWA.

3. Article XXIII of the 1993 NBCWA sets forth that the parties have agreed to resolve disputes exclusively by arbitration without recourse to the Courts. Plaintiff has therefore waived its right to pursue this matter before this Court.

4. The arbitration award at issue draws its essence from the collective bargaining agreement between the parties. Plaintiff may not seek to relitigate factual and legal issues presented to Arbitrator Barrett, in light of this Court's limited scope of review under the *Steelworkers Trilogy.*[1]

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[1] *Steelworkers* v. *American Mfg Co.*, 363 U.S. 564 (1960); *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

WHEREFORE, Defendants respectfully request that this Court:

1. Deny Plaintiff's prayer for relief;

2. Dismiss Plaintiff's action with prejudice and enforce the arbitration award against Plaintiff;

3. Award Defendants' their costs and attorneys' fees;

4. Award such other relief as is deemed just and proper.

COUNTERCLAIM TO ENFORCE FINAL AND BINDING ARBITRATION AWARD

COME NOW Defendants District 17, United Mine Workers of America and Local Union 1503, United Mine Workers of America by the undersigned counsel and hereby file this counterclaim to enforce a valid, final and binding arbitration award, and in support thereof allege as follows against Plaintiff and Counterclaim-Defendant Eastern Associated Coal Corporation (hereafter referred to as the "Employer"):

1. This action is brought by the UMWA pursuant to the provisions of Section 301 of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185, to enforce a valid, final and binding arbitration award rendered under the terms of the parties' collective bargaining agreement.

2. This Court has jurisdiction over the UMWA's counterclaim under 29 U.S.C. § 185 and 28 U.S.C. §§ 1331 and 1337.

3. District 17, UMWA, is an unincorporated association having its principal office in Charleston, West Virginia. District 17 is a labor organization within the meaning of 29 U.S.C. § 152(5) and 29 U.S.C. § 185, and is engaged in the representation of coal miners in the State of West Virginia for collective bargaining purposes, and as such is party to a collective bargaining agreement with the Employer.

4. Local Union 1503, UMWA, is an unincorporated association and a labor organization within the meaning of 29 U.S.C. § 152(5) and 29 U.S.C. § 185, and is engaged in the representation of coal miners in the State of West Virginia for collective bargaining purposes, and as such is party to a collective bargaining agreement with the Employer.

5. Eastern Associated Coal Corporation is a West Virginia corporation authorized to do business under the laws of the State of West Virginia, and is an employer engaged in interstate commerce within the meaning of 29 U.S.C. §152 (2), (6) and (7), and is signatory to a collective bargaining agreement with the UMWA within the meaning of Section 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185 ("LMRA").

6. The UMWA and the Employer are bound to a collective bargaining agreement known as the 1993 National Bituminous Coal Wage Agreement ("1993 NBCWA"), with effective dates of December 16, 1993 through August 1, 1998. Article XXIII and XXVII of the 1993 NBCWA provide for the final and binding resolution of disputes arising under the collective bargaining agreement through a grievance and arbitration procedure.

7. On July 17, 1997, James Smith, an employee of the Employer and a member of the UMWA, filed a grievance with the Employer alleging that the Employer violated the 1993 NBCWA by suspending Smith with intent to discharge him. Having failed to resolve the grievance, the parties submitted the matter to final and binding arbitration, as required by Article XXIII and XXVII of the 1993 NBCWA.

8. On July 28, 1997, Arbitrator Jerome T. Barrett held a hearing on the grievance, at which time the parties had the opportunity to present evidence, raise objections, argue their positions, present and examine witnesses, cross-examine witnesses, and otherwise fully present their case.

9. On August 1, 1997, Arbitrator Jerome T. Barrett issued an arbitration award which is attached herein as Exhibit 1.

10. Arbitrator Barrett's arbitration award draws its essence from the collective bargaining agreement and is final and binding upon the parties to this action.

WHEREFORE, District 17 and Local Union 1503 pray that judgment and relief be entered against Eastern Associated Coal Corporation, which judgment shall:

a. enforce the final and binding Arbitration Award of Arbitrator Jerome T. Barrett rendered on August 1, 1997;

b. award attorneys' fees and costs to the Counterclaim-Plaintiffs; and

c. award such other relief as this Court deems just and proper.

Respectfully submitted,

DEFENDANTS DISTRICT 17, UNITED MINE WORKERS OF AMERICA AND LOCAL UNION 1503, UNITED MINE WORKERS OF AMERICA,

By Counsel:

/s/ Kevin F. FAGAN
KEVIN F. FAGAN, ATTORNEY AT LAW
District 17, United Mine Workers of America
PO Box 1313
Charleston WV 25325-1313
(304) 346-0341

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

Civil Action No. : 2:97-0819

EASTERN ASSOCIATED COAL CORP.,
Plaintiff,

v.

UNITED MINE WORKERS OF AMERICA,
DISTRICT 17 AND LOCAL UNION NO. 1503,
Defendants.

REPLY TO COUNTERCLAIM

In reply to the counterclaim, Eastern Associated Coal Corp. ("EACC"), states:

1. Paragraph 1 of the counterclaim does not set forth an allegation and therefore no response is necessary.

2. EACC admits that this Court has subject matter jurisdiction over the Union's counterclaim under 29 U.S.C. § 185 and denies the remaining allegation contained in paragraph 2 of the counterclaim.

3. EACC admits the allegations contained in paragraph 3 of the counterclaim.

4. EACC admits the allegations contained in paragraph 4 of the counterclaim.

5. EACC admits the allegations contained in paragraph 5 of the counterclaim.

6. EACC admits the allegations contained in paragraph 6 of the counterclaim except to the extent that they allege that the award is valid and enforceable.

7. EACC admits the allegations contained in paragraph 7 of the counterclaim except to the extent that they allege the award is valid and enforceable.

8. EACC admits the allegations contained in paragraph 8 of the counterclaim.

9. EACC admits the allegation contained in paragraph 9 of the counterclaim.

10. EACC denies the allegation contained in paragraph 10 of the counterclaim.

11. All allegations of the counterclaim not specifically admitted are denied.

AFFIRMATIVE DEFENSES

1. The counterclaim fails to state a claim upon which relief can be granted.

2. The award cannot be enforced because it does not draw its essence from the contract since the award violates public policy.

3. The Union is not entitled to attorneys' fees and costs.

4. As further affirmative defenses, EACC relies on the matters set forth in its complaint.

Respectfully submitted,

EASTERN ASSOCIATED COAL CORP.
By Counsel

/s/ Donna C. Kelly
FORREST H. ROLES
DONNA C. KELLY
HEENAN, ALTHEN & ROLES
1380 One Valley Square
P. O. Box 2549
Charleston, WV 25329-2549
(304) 342-8960

RONALD E. MEISBURG
HEENAN, ALTHEN & ROLES
1110 Vermont Ave., N.W.
Washington, D.C. 20005
(202) 887-0800

NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1993 (Excerpts)

Article IA—SCOPE AND COVERAGE

* * * *

Section (d) **Management of the Mines**

The management of the mine, the direction of the working force and the right to hire and discharge are vested exclusively in the Employer.

* * * *

Article III—HEALTH AND SAFETY

Section (a) **Right to a Safe Working Place**

Every Employee covered by this Agreement is entitled to a safe and healthful place to work, and the parties jointly pledge their individual and joint efforts to attain and maintain this objective. Recognizing that the health and safety of the Employees covered by this Agreement are the highest priorities of the parties, the parties agree to comply fully with all lawful notices and orders issued pursuant to the Federal Mine Safety and Health Act of 1977, as amended, and pursuant to the various state mining laws.

Section (b) **Federal Mine Safety and Health Act of 1977, As Amended**

The parties to this contract, finding themselves in complete accord with the FINDINGS AND PURPOSE declared by the United States Congress in section 2 of the Federal Mine Safety and Health Act of 1977 do hereby affirm and subscribe to the principles as set forth in such section 2 of the Act.

(1) In consequence of this affirmation, the parties not only accept their several responsibilities, obligations and duties imposed by the Federal Mine Safety and Health Act, but freely resolve to cooperate among each other and with the

responsible officials of federal and state governments in determined efforts to achieve greatly improved performance in coal mine health and safety.

(2) Neither party waives nor repudiates any administrative, procedural, legislative, or judicial rights under or relating to the Federal Mine Safety and Health Act of 1977, as amended.

Section (c) **Joint Industry Health and Safety Committee**

There shall be a Joint Industry Health and Safety Committee composed of six members, three to be appointed by the Union, one of whom shall have special knowledge and expertise in coal mine health matters, and three to be appointed by the Employers, one of whom shall have special knowledge and expertise in coal mine health matters. The Committee shall consult with the Mine Safety and Health Administration and/or representatives of the Secretary of Health and Human Services, looking toward review and appropriate development and revision of improved mandatory health and safety standards as provided in section 101 of the Federal Mine Safety and Health Act of 1977. The Committee may also seek such joint consultations with the Mine Safety and Health Administration for discussion of the technical aspects of petitions by the Employer or the Union as provided in section 101(c) of the Act.

* * * *

ARTICLE XXIII—SETTLEMENT OF DISPUTES

* * * *

Section (c) **Grievance Procedure**

Should differences arise between the Mine Workers and an Employer as to the meaning and application of the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should any local trouble of any kind arise at the mine, an earnest effort

shall be made to settle such differences at the earliest practicable time.

Disputes arising under this Agreement shall be resolved as follows:

(1) The Employee will make his complaint to his immediate foreman who shall have the authority to settle the matter. The foreman will notify the Employee of his decision within 24 hours following the day when the complaint is made. Settlements or withdrawals at this step shall not constitute a precedent in the handling of other grievances.

(2) If no agreement is reached between the Employee and his foreman. the complaint shall be submitted on the BCOA-UMWA Standard Grievance Form and shall be taken up within five working days of the foreman's decision by the Mine Committee and mine management. Where the committee consists of more than three (3) members, the Employer shall have the right to meet with a maximum of three (3) (to be chosen by the Mine Committee). Within five working days after the complaint is taken up by them, the committee and management will complete the standard grievance form and, if the complaint is not settled, the grievance shall be referred to a representative of the UMWA district, designated by the Union, and a representative of the Employer.

(3) Within seven working days of the time the grievance is referred to them, the district representative and the representative of the Employer shall meet and review the facts and pertinent contract provisions in an effort to reach agreement. Members of the Mine Committee shall have the right to be present. No verbatim transcript of the testimony shall be taken. Neither the district representative nor the Employer representative shall be persons who participated in steps 1 or 2 of this procedure.

(4) In cases where the district representative and the representative of the Employer fail to reach agreement, the matter shall, within 10 calendar days after referral to them, be referred to the appropriate district arbitrator who shall decide the case without delay. Cases shall be assigned to district arbitrators in rotation. The parties agree that the expeditious processing of grievances is a major function of this Article, and that consolidation of cases before a single arbitrator can aid in achieving that goal, and where applicable, this procedure should be given serious consideration.

Therefore, in order to expedite the proccessing of grievances awaiting arbitration, the parties may agree that grievances pending arbitration concerning the same operation of the Employer for which an arbitrator has not been assigned, shall be assigned to a single arbitrator if such cases can be heard on the same day, at the same place. Hearings shall take place at a location mutually agreed upon by the parties. If the parties are unable to agree upon a hearing place, the umpire shall select the place. At the earliest possible time, but no later than 15 days after referral to him, the arbitrator shall conduct a hearing in order to hear testimony, receive evidence and consider arguments.

In cases in which the parties have agreed that there is no question of fact involved in the grievance, the arbitrator may decide the case upon the basis of a joint statement of the parties and such exhibits as they shall submit. The hearing shall be recorded by the arbitrator and shall be closed upon the completion of testimony. The arbitrator shall render his decision as soon after the close of the hearing as may be feasible. To avoid delays in the issuance of decisions, post hearing briefs will not be permitted except in cases where the arbitrator determines that such briefs are necessary for a full understanding of the matter before him. If the arbitrator is unable to make his decision within 30 days of the close of the hearing, he shall promptly advise the parties of the reasons for

the delay and the date when his decision will be submitted. The arbitrator's decision shall be final and shall govern only the dispute before him. Expenses and fees incident to the service of an arbitrator shall be paid equally by the Employer affected and by the UMWA district affected.

Section (d) **Ten Day Limitation**

Any grievance which is not filed by the aggrieved party within ten (10) working days of the time when the Employee reasonably should have known it, shall be denied as untimely and not processed further.

Section (e) **Earnest Effort to Resolve Disputes**

An earnest effort shall be made to settle differences at the earliest practicable time. Where an Employee makes a complaint during work time, the foreman shall, if requested to do so, and if possible, consistent with continuous production, discuss the matter briefly on the spot.

At all steps of the complaint and grievance procedure, the grievant and the Union representatives shall disclose to the company representatives a full statement of the facts and the provisions of the Agreement relied upon by them. In the same manner, the company representatives shall disclose all the facts relied upon by the company.

Section (f) **Employee's Right to Presence of Member of Mine Committee**

Except where it will interfere with production, an Employee shall be entitled, at his request, to have a member of the Mine Committee present to assist him at any discussion with his foreman held pursuant to section (c)(2) of this Article. If a member of the Mine Committee is present during such discussion, the foreman involved may have another representative of the Employer in attendance.

Section (g) **Right of Grievant to be Present**

The grievant shall have the right to be present at each step of the grievance procedure until such time as all evidence is taken.

Section (h) **Finality of Decision or Settlement**

Settlement reached at any step of the grievance procedure shall be final and binding on both parties and shall not be subject to further proceedings under this Article except by mutual agreement. Settlements reached at steps 2 and 3 shall be in writing and signed by appropriate representatives of the Union and the Employer.

Section (i) **Exclusion of Legal Counsel**

Neither party will be represented by an attorney licensed to practice law in any jurisdiction in steps 1 through 4 of the grievance procedure except by mutual agreement applicable only to a particular case.

Section (i) **Waiver of Time Limits**

By agreement the parties may waive the time limits set forth in each step of the grievance procedure.

Section (k) **Prior Agreement**

Any dispute and/or difference which as of the effective date of this Agreement is in the process of adjustment under the Settlement of Disputes section of the prior Agreement or any dispute and/or difference presented on or after the effective date of this Agreement which is based on the occurrence or nonoccurrence of an event which arose prior to the effective date of this Agreement shall be processed under the procedural provisions of this Agreement and shall be resolved under the applicable provisions of the prior Agreement. Decisions reached under this provision shall be final and binding. All decisions of the Arbitration Review Board rendered prior to the expiration of the National Bituminous

Coal Wage Agreement of 1978 shall continue to have precedential effect under this Agreement to the extent that the basis for such decisions have not been modified by subsequent changes in this Agreement.

Article XXIV—DISCHARGE PROCEDURE

Section (a) **Just Cause Required**

No Employee covered by this Agreement may be disciplined or discharged except for just cause. The burden shall be on the Employer to establish grounds for discharge in all proceedings under this Agreement.

Section (b) **Procedure**

Where management concludes that the conduct of an Employee justifies discharge, the Employee shall be suspended with intent to discharge and shall be given written notice stating the reason, with a copy to be furnished to the Mine Committee. After 24 hours, but within 48 hours, the Employee shall be afforded the right to meet with the mine superintendent or manager. At such meeting, a member or members of the Mine Committee shall be present and, if requested by the Employee or the Mine Committee, a representative of the District shall also be present. When the district representative requests, the forty-eight hour time limit will be extended by an additional 48 hours. The Employer shall be entitled to have an equal number of representatives at the meeting.

Section (c) **Suspension**

If the Employer informs the Employee at the meeting between the Employee and the mine superintendent or manager that he still intends to discharge the Employee (or if no meeting was requested), the Employee remains suspended with intent to discharge for a period of time necessary to permit him to file a grievance and have it arbitrated. If the Employee does not file a grievance within five days of the no-

tice of suspension with intent to discharge, the discharge shall become effective immediately.

Section (d) **Immediate Arbitration**

(1) If the District believes that just cause for discharge does not exist, it shall arrange with the Employer for immediate arbitration of the dispute, bypassing steps one through three of the grievance procedure.

(2) The next available district arbitrator shall immediately be assigned to hear the case.

(3) The appropriate district arbitrator shall hear the case within five days. At the conclusion of the hearing, the district arbitrator shall at that time announce his decision which shall be binding on all parties. Following the hearing, the arbitrator shall forthwith reduce his decision to writing within 10 days. If the arbitrator determines that the Employer has failed to establish just cause for the Employee's discharge, the Employee shall be immediately reinstated to his job. If the arbitrator determines that there was just cause for the discharge, the discharge shall become effective upon the date of the arbitrator's decision.

Section (e) **Regular Arbitration**

If neither the Employee nor the Mine Committee request immediate arbitration, the Employee shall be discharged at the conclusion of the fifth day of his suspension, and his case shall be processed in accordance with the provisions of Article XXIII (Settlement of Disputes).

Section (f) **Compensation for Lost Earnings**

In all cases where it is determined that just cause for discharge has not been established, the Employee shall be reinstated and compensated for lost earnings at his applicable straight and premium time rates prior to discharge. Provided,

however, that such case shall be taken up within five (5) days from the date of discharge.

Supreme Court, U.S.
FILED
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(5)

No. 99-1038

IN THE

Supreme Court of the United States

EASTERN ASSOCIATED COAL CORPORATION,
Petitioner,

v.

UNITED MINE WORKERS OF AMERICA, DISTRICT 17;
LOCAL 1503, UNITED MINE WORKERS OF AMERICA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONER

RONALD E. MEISBURG
HEENAN, ALTHEN & ROLES
1110 Vermont Avenue, N.W.
Suite 400
Washington, D.C. 20005
(202) 887-0800

ANNA M. DAILEY
DONNA C. KELLY
HENNAN, ALTHEN & ROLES
1380 One Valley Square
P.O. Box 2549
Charleston, WV 25329
(304) 342-8960

JOHN G. ROBERTS, JR.*
DAVID G. LEITCH
H. CHRISTOPHER BARTOLOMUCCI
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

* Counsel of Record

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether courts asked to vacate arbitration awards on public policy grounds are limited to determining whether the award itself violates positive law or requires unlawful conduct, or instead may identify "well defined and dominant" public policies and set aside arbitration awards that contravene such policies.

2. Whether there is a well defined and dominant public policy that prohibits enforcement of arbitration awards requiring reinstatement to safety-sensitive positions of employees who test positive for illegal drugs, or whether no such policy exists and courts must therefore uphold such reinstatement.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Eastern Associated Coal Corporation was the plaintiff-appellant below. Respondents the United Mine Workers of America, District 17, and Local 1503 of the United Mine Workers of America, were defendants-appellees below.

Petitioner is wholly owned by Coal Properties Corporation, which is in turn wholly owned by Peabody Holding Company, Inc., which is in turn wholly owned by P&L Coal Holdings Corporation. No publicly held company owns 10 percent or more of petitioner's stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY AND REGULATORY PROVISIONS INVOLVED	2
INTRODUCTION	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	8
ARGUMENT	11
I. AN ARBITRATOR'S AWARD NEED NOT VIOLATE POSITIVE LAW BEFORE IT MAY BE SET ASIDE AS VIOLATING WELL DEFINED AND DOMINANT PUBLIC POLICY	11
A. It Is Well Established That A Court Will Not Enforce A Contract Contrary To Public Policy	12
B. The Public Policy Exception To Enforcement of Contracts Is Not Limited To Contracts That Violate Positive Law	14
C. The Public Policy Doctrine Applies To Labor Arbitration Awards	20

TABLE OF CONTENTS—Continued

Page

D. The Decision Of The Court Of Appeals Cannot Stand 28

II. ENFORCEMENT OF THE REINSTATEMENT AWARD IS CONTRARY TO WELL DEFINED AND DOMINANT PUBLIC POLICY 29

A. There Is An Undisputed Well Defined And Dominant Public Policy—Derived From Legislation, Regulation, And Precedent—Against Employees Performing Safety-Sensitive Jobs While Under The Influence Of Illegal Drugs 30

B. There Is Also A Well Defined And Dominant Public Policy—Derived From Legislation, Regulation, And Precedent—Against Employees In Safety-Sensitive Positions Using Illegal Drugs Whether On Or Off The Job 33

C. Enforcement Of The Arbitrator's Award Reinstating Smith Would Violate Public Policy 38

D. The Contrary Arguments Are Unavailing 44

CONCLUSION 48

STATUTORY AND REGULATORY APPENDIX

Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a) 1a

Selected Portions of the Omnibus Transportation Employee Testing Act of 1991, Pub. L. No. 102-143, Title V, 105 Stat. 917, 952-965 ..... 1a

Selected Portions of Title 49 of the Code of Federal Regulations, Part 382 ..... 8a

TABLE OF AUTHORITIES

Page

Cases:

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AFSCME v. *Department of Cent. Management Servs.*, 671 N.E.2d 668 (Ill. 1996) 23-24

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) 25

Amalgamated Meat Cutters v. *Great Western Food Co.*, 712 F.2d 122 (5th Cir. 1983) 39, 45

American Postal Workers Union v. *United States Postal Serv.*, 789 F.2d 1 (D.C. Cir. 1986) 22

Baltimore & Ohio S.W. Ry. v. *Voigt*, 176 U.S. 498 (1900) 30

Barrentine v. *Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981) 26

Bolling v. *Sharpe*, 347 U.S. 497 (1954) 16

Burt v. *Union Cent. Life Ins. Co.*, 187 U.S. 362 (1902) 40

Capazzoli v. *Holzwasser*, 490 N.E.2d 420 (Mass. 1986) 18

Chicago, St. Louis & New Orleans R.R. v. *Pullman Southern Car Co.*, 139 U.S. 79 (1891) 30, 45

Crocker v. *United States*, 240 U.S. 74 (1916) 40

Davies v. *Grossmont Union High Sch. Dist.*, 930 F.2d 1390 (9th Cir.), *cert. denied*, 501 U.S. 1252 (1991) 18

Delta Air Lines, Inc. v. *Air Line Pilots Ass'n Int'l*, 861 F.2d 665 (11th Cir. 1988), *cert. denied*, 493 U.S. 871 (1989) 32, 45

E.I. DuPont de Nemours & Co. v. *Grasselli Employees Indep. Ass'n*, 790 F.2d 611 (7th Cir.), *cert. denied*, 479 U.S. 853 (1986) 22, 23, 24, 40

Exxon Corp. v. *Baton Rouge Oil & Chem. Workers Union*, 77 F.3d 850 (5th Cir. 1996) 32

Exxon Corp. v. *Esso Workers' Union, Inc.*, 118 F.3d 841 (1st Cir. 1997) 31, 36, 43

TABLE OF AUTHORITIES—Continued

Page

Exxon Shipping Co. v. *Exxon Seamen's Union*, 73 F.3d 1287 (3d Cir.), *cert. denied*, 517 U.S. 1251 (1996) 22, 23, 37
Exxon Shipping Co. v. *Exxon Seamen's Union*, 11 F.3d 1189 (3d Cir. 1993) 22, 24, 41
Exxon Shipping Co. v. *Exxon Seamen's Union*, 993 F.2d 357 (3d Cir. 1993) 22, 23, 39, 40, 45
Gilmer v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) 27
Gulf Coast Indus. Workers Union v. *Exxon Co., U.S.A.*, 991 F.2d 244 (5th Cir.), *cert. denied*, 510 U.S. 965 (1993) ..... *passim*
Hanford v. *Connecticut Fair Ass'n*, 103 A. 838 (Conn. 1918) 38
Hazelton v. *Scheckells*, 202 U.S. 71 (1906) 13
Hurd v. *Hodge*, 334 U.S. 24 (1948) 13, 15
IBEW, Local 97 v. *Niagara Mohawk Power Corp.*, 143 F.3d 704 (2d Cir. 1998) 44
Iowa Elec. Light & Power Co. v. *Local Union 204, IBEW*, 834 F.2d 1424 (8th Cir. 1987) 22, 26, 46
Kaiser Steel Corp. v. *Mullins*, 455 U.S. 72 (1982) 21
The Kensington, 183 U.S. 263 (1902) 15
Local No. P-1236 v. *Jones Dairy Farm*, 680 F.2d 1142 (7th Cir. 1982) 20, 25, 26
Lochner v. *New York*, 198 U.S. 45 (1905) 13
Marshall v. *Baltimore & Ohio R.R.*, 57 U.S. 314 (1853) 14
Martin v. *Wilks*, 490 U.S. 755 (1989) 14
McBrearty v. *United States Taxpayers Union*, 668 F.2d 450 (8th Cir. 1982) 18
McDonald v. *City of West Branch*, 466 U.S. 284 (1984) 25
McMullen v. *Hoffman*, 174 U.S. 639 (1899) 12
Meguire v. *Corwine*, 101 U.S. 108 (1879) 12, 15
Muschany v. *United States*, 324 U.S. 49 (1945) 19, 20, 29

TABLE OF AUTHORITIES—Continued

Page

National Licorice Co. v. *NLRB*, 309 U.S. 350 (1940) 20
NCAA v. *Smith*, 525 U.S. 459 (1999) 28
NLRB v. *Dixie Motor Coach Corp.*, 128 F.2d 201 (5th Cir. 1942) 30
Northwest Airlines, Inc. v. *Air Line Pilots Ass'n, Int'l*, 808 F.2d 76 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1014 (1988) 22
President of the Bank of the United States v. *Owens*, 27 U.S. 527 (1829) 12, 13, 15
Richardson v. *Mellish*, 2 Bing. 229, 130 Eng. Rep. 294 (1824) 19
Ritter v. *Mutual Life Ins. Co.*, 169 U.S. 139 (1898) .. 13, 40, 44
Seymour v. *Blue Cross/Blue Shield*, 988 F.2d 1020 (10th Cir. 1993) 14
Shadis v. *Beal*, 685 F.2d 824 (3d Cir.), *cert. denied*, 459 U.S. 970 (1982) 18
Shelley v. *Kraemer*, 334 U.S. 1 (1948) 15
Skinner v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) 31
Southwestern Sugar & Molasses Co. v. *River Terminals Corp.*, 360 U.S. 411 (1959) 39
Sprott v. *United States*, 87 U.S. 459 (1874) 12
Stead Motors of Walnut Creek v. *Automotive Machinists Lodge No. 1173*, 886 F.2d 1200 (9th Cir. 1989) (en banc), *cert. denied*, 495 U.S. 946 (1990) 24
Tool Co. v. *Norris*, 69 U.S. 45 (1864) 40
Town of Newton v. *Rumery*, 480 U.S. 386 (1987) 13, 16, 39
Trist v. *Child*, 88 U.S. 441 (1874) 12, 14-15
Union Pac. R.R. v. *United Transp. Union*, 3 F.3d 255 (8th Cir. 1993), *cert. denied*, 510 U.S. 1072 (1994) 32, 39, 40
United Food & Commercial Workers Int'l Union, Local 588 v. *Foster Poultry Farms*, 74 F.3d 169 (9th Cir. 1996) 22

TABLE OF AUTHORITIES—Continued

Page

United Paperworkers Int'l Union v. *Misco, Inc.*, 484 U.S. 29 (1987) ..... *passim*
United States v. *Bestfoods*, 524 U.S. 51 (1998) 28
United States Postal Serv. v. *American Postal Workers Union*, 736 F.2d 822 (1st Cir. 1984) .. 22, 23, 24, 41
United States Postal Serv. v. *National Ass'n of Letter Carriers*, 481 U.S. 1301 (1987) 41
United States Postal Serv. v. *National Ass'n of Letter Carriers*, 810 F.2d 1239 (D.C. Cir. 1987), *cert. dismissed*, 485 U.S. 680 (1988) 22
United Steelworkers v. *American Mfg. Co.*, 363 U.S. 564 (1960) 26
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United Steelworkers v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) 26
United Transp. Union v. *Union Pac. R.R.*, 116 F.3d 430 (9th Cir. 1997) 33
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Statutory Provisions:

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1291 2
42 U.S.C. § 1983 16
42 U.S.C. § 2473c 34
46 U.S.C. § 7702(c)(2) 34
49 U.S.C. § 20140 37

TABLE OF AUTHORITIES—Continued

	Page
49 U.S.C. § 45102(a), (b)	37
Commercial Motor Vehicle Safety Act of 1986	
49 U.S.C. § 31301, *et seq.*	34
49 U.S.C. § 31306(b)(1)(A)	34, 37
Drug-Free Workplace Act of 1988, 41 U.S.C. § 701	30
Drug-Free Workplace Act of 1998, 15 U.S.C. § 654	30
Labor Management Relations Act of 1947, 29 U.S.C. § 173(d)	26
Omnibus Transportation Employee Testing Act of 1991, Pub. L. No. 102-143, Title V, 105 Stat. 917, 952-965	3
§ 2(3)	3, 10, 34, 35, 36
§ 2(4)	3, 34
§ 2(5)	3, 34
§§ 3-4, 6	3
§§ 3-6	34
§ 5(a)(1)	3
§ 5(b)(7)	37
W. Va. Code § 17C-5-2	32
W. Va. Code § 17E-1-13(a)	32

Regulations and Executive Materials:

14 C.F.R. Part 121	
Appendix I	36
Appendix I, Part III	37
49 C.F.R. Part 40	37
49 C.F.R. § 40.21(a)	37
49 C.F.R. Part 219	36
49 C.F.R. § 219.3	37
49 C.F.R. Part 382	
§ 382.101	3-4, 35
§ 382.103	37
§ 382.103(a)	4
§ 382.105	37
§ 382.107	37
§ 382.111	4, 46

TABLE OF AUTHORITIES—Continued

	Page
§ 382.213(b)	35
§ 382.215	35
§ 382.301(a)	5
§ 382.305(a)	5
§ 382.305(m)	35
§ 382.309	46
§ 382.311(b)	35
§ 382.501(b)	35
§ 382.503	46
§ 382.601(c)	4, 46
§ 382.605	46
49 C.F.R. § 392.4(a)	32
49 C.F.R. Part 653	36
49 C.F.R. § 653.7	37
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TABLE OF AUTHORITIES—Continued

	Page
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Chapter 8	12
Introductory Note to Chapter 8	13
§ 178(1)	9, 16, 19
§ 179	16
§ 179, comment b	17, 47
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Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999 (1955)	25
5 *Williston on Contracts* (4th ed. 1993)	17
14 *Williston on Contracts* (3d ed. 1972)	38
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IN THE

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EASTERN ASSOCIATED COAL CORPORATION,
Petitioner,

v.

UNITED MINE WORKERS OF AMERICA, DISTRICT 17;
LOCAL 1503, UNITED MINE WORKERS OF AMERICA,
Respondents.

On Writ of Certiorari to
the United States Court of Appeals
for the Fourth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is unreported and reproduced in the appendix to the petition for certiorari ("Pet. App.") at 1a. The opinion of the District Court for the Southern District of West Virginia is reported at 66 F. Supp. 2d 796 and reproduced at Pet. App. 5a.

JURISDICTION

The judgment of the Fourth Circuit was entered on August 20, 1999. Pet. App. 1a. The Fourth Circuit denied a timely petition for rehearing and rehearing en banc on September 20, 1999. *Id.* 22a. The petition for certiorari was filed on December 17, 1999, and granted on March 20, 2000. 120 S.

Ct. 1416. The jurisdiction of the Fourth Circuit was based on 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reprinted in an appendix to this brief.

INTRODUCTION

Eastern Associated Coal Corporation ("EACC") employs commercial drivers who drive trucks weighing as much as 55,000 pounds on the public roads and highways of West Virginia. One of EACC's drivers failed a drug test twice within 15 months, and each time EACC tried to fire him. Each time an arbitrator ordered the driver reinstated, although there was no dispute about the accuracy of the test results. After the second reinstatement order EACC went to court, seeking to vacate the order as contrary to public policy. The courts below refused to vacate the award, however, and instead enforced it on the ground that reinstatement of the driver did not violate public policy because it was not illegal.

The judgment below should be reversed. It has long been established that courts will not enforce contracts that are contrary to public policy. That basic principle is not restricted to contracts that violate positive law, but has always extended—almost by definition—to agreements that "violate law *or* public policy." *United Paperworkers Int'l Union* v. *Misco, Inc.*, 484 U.S. 29, 42 (1987) (emphasis added).

This rule is fully applicable to arbitration awards entered pursuant to collective bargaining agreements. Despite the traditional deference to such awards, courts will refuse to enforce them if doing so would contravene some "well defined and dominant public policy." *Id.* at 43 (quotation omitted). As federal and state statutes, regulations, and judicial decisions amply confirm, there is such a policy

against both on-the-job impairment and use of illegal drugs at any time by individuals in safety-sensitive positions—particularly in the transportation industry, where an accident caused by drug use could readily endanger innocent lives. Reinstatement of a commercial driver who has twice failed a drug test within 15 months violates that clear public policy. The courts should not lend their aid to such a violation—and become complicit in the threat to public safety it entails—by enforcing the arbitrator's award.

STATEMENT OF THE CASE

Background. In the Omnibus Transportation Employee Testing Act of 1991, Pub. L. No. 102-143, Title V, 105 Stat. 917, 952-965 ("Testing Act"), Congress found that "the use of alcohol and illegal drugs * * * has been proven to have been a critical factor in transportation accidents," that "the greatest efforts must be expended to eliminate the abuse of alcohol and use of illegal drugs, whether on duty or off duty, by those individuals who are involved in the operation of aircraft, trains, trucks, and buses," and that "the most effective deterrent to abuse of alcohol and use of illegal drugs is increased testing." *Id.* §§ 2(4), 2(3), 2(5), 105 Stat. 953. In light of those findings, Congress directed the Secretary of Transportation, "in the interest of commercial motor vehicle safety," to promulgate regulations requiring employers to establish programs for testing their commercial drivers for alcohol and controlled substances. *Id.* § 5(a)(1), 105 Stat. 959.[1]

The Secretary issued such regulations in 1994, "to establish programs designed to help prevent accidents and injuries resulting from the misuse of alcohol or use of controlled substances by drivers of commercial vehicles." 49 C.F.R.

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[1] The legislation also covered pilots and other aviation employees, railroad workers, and mass transit employees. *See* Testing Act §§ 3-4, 6, 105 Stat. 953-959, 962-963.

§ 382.101. The DOT regulations specify minimum requirements for such programs, but do not otherwise affect the authority of employers with respect to alcohol or drugs, or restrict "additional employer policies with respect to the use of alcohol or controlled substances, including any consequences for a driver found to have a specified alcohol or controlled substances level * * *." *Id.* § 382.601(c); *see id.* § 382.111. In issuing the testing rules, the Secretary noted that the "primary objective" was "deterrence rather than detection," and stressed that it was therefore important that "employers make their drivers fully aware of * * * the potential consequences for people who violate this rule." 59 Fed. Reg. 7484, 7502 (Feb. 15, 1994).

EACC is a coal mining company. Its business requires the operation of heavy equipment—including mammoth trucks having gross vehicle weights of as much as 55,000 pounds—on public roads and highways. Pet. App. 6a. Operators of such equipment hold a position within EACC known as a Mobile Equipment Operator ("MEO"), and are required to have a commercial driver's license ("CDL"). That requirement triggered coverage under the DOT regulations, *see* 49 C.F.R. § 382.103(a), and EACC accordingly established an alcohol and drug testing program for its drivers. Pet. App. 6a-7a. Under EACC's Drug and Alcohol Policy, "[i]f a driver submits a urine specimen for the purpose of a drug test, and the test shows positive levels * * * the driver will be removed from any safety sensitive position and subject to disciplinary action *up to and including termination*." *Id.* 9a n.4 (emphasis added).

EACC and the union representing its employees—respondents United Mine Workers of America, District 17, and Local 1503 of the United Mine Workers (collectively, "the Union")—are bound by the National Bituminous Coal Wage Agreement ("Agreement"). *Id.* 5a. Under the Agreement, "[t]he management of the mine, the direction of the working force and the right to hire and discharge are

vested in" EACC. J.A. 24. EACC may discharge an employee for "just cause." *Id.* 30. An employee who believes just cause does not exist for his discharge may initiate a grievance procedure culminating in arbitration. *Id.* 31.

James Smith's Positive Drug Tests. In early 1996, EACC drilling operator James Smith bid on and was selected to fill a vacant MEO position. Under the DOT regulations, employees filling such a position must be tested "[p]rior to the first time [they] perform[] safety-sensitive functions for an employer," 49 C.F.R. § 382.301(a), and randomly thereafter. *Id.* § 382.305(a). In a test conducted in March 1996, Smith tested positive for the presence of cannabinoids—the chemical constituents of marijuana. Pursuant to the procedure outlined in the Agreement, EACC suspended Smith with the intent to discharge him, and then discharged him.

Neither Smith nor the Union ever challenged the accuracy of the 1996 drug test. Pet. App. 7a n.2. Nevertheless, Smith filed a grievance challenging his discharge, and an arbitrator entered an award in his favor. Under the award, Smith returned to work after a 30-day suspension without back pay and was required to participate in a substance abuse program. The arbitrator also required Smith to submit to random drug testing for five years. *Id.* 7a.

In June 1997, while Smith was working as an MEO, his fourth random drug test yielded another positive result for cannabinoids, and EACC again suspended and then discharged him. *Id.* 3a, 7a-8a. Smith again sought arbitration without challenging the accuracy of the test results, *id.* 8a n.3, and an arbitrator again ordered Smith reinstated. It is this second arbitration award, described more fully below, that is directly at issue in this case.

The Arbitration Award. The arbitrator found that "[t]he record is clear that the company has made a good faith effort through it's [sic] employee assistance program to rehabilitate the grievant," and that while Smith "appeared to be making a

good faith effort to be rehabilitated," his "failure to stay drug free is disappointing." *Id.* 27a. The arbitrator further recognized that "[i]t is understandable why the company wants to put an end to the matter by discharging grievant. The liability the company faces when an employee assigned to operate company equipment on public roads is found with drugs in his urine is very real." *Id.* The arbitrator found that Smith had received "full credit for his good record in the earlier arbitration" and for the fact that he was a "recreational user of illegal drugs and not an addicted user." *Id.*[2] Criticizing Smith's argument that he might have avoided a first positive test had he been aware that he was going to be tested upon moving to an MEO position, the arbitrator noted that "[o]ne does not avoid illegal drugs because one might be tested," but rather because "drugs have a negative impact on job performance, safety and company liability." *Id.* 28a.

Despite all this, the arbitrator once again "rescued" Smith from the "understandable" consequences of his actions. *Id.* 27a. He found "creditable" Smith's testimony that a "personal/family problem * * * caused this one time lapse in drug usage." *Id.* 28a. The arbitrator nevertheless recognized the possibility that he may have been "misled by the grievant," and apparently found comfort in the fact that he was "confident," if that were the case, "that the grievant will make another misstep with drug use and be caught." *Id.* Giving Smith the chance to make such a "misstep" while operating heavy equipment on the public highways, the arbitrator ordered Smith reinstated. The arbitrator urged Smith "to handle both the personal/family problems along with the

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[2] The reference to Smith's "good record" referred to his prior employment record with the company, not to any previous experience under the drug testing program. Testing was instituted at EACC in January 1996, when the DOT regulations took effect, and Smith's first failure occurred in March 1996. His second failure came only 14 months after he was reinstated following the first failure. Pet. App. 25a-26a.

drug use problem" in future counseling, and required him to provide EACC with a resignation letter which the company could accept if Smith tested positive for drugs a *third* time. *Id.* 29a.

Decisions Below. Seeking to overturn the arbitration award, EACC filed a complaint in federal district court which alleged, among other things, that the reinstatement award clearly violated public policy and therefore must be vacated. J.A. 11-12. The Union filed an answer and counterclaim seeking enforcement of the award. *Id.* 14-20. Both parties moved for summary judgment.

The District Court upheld the arbitrator's decision and granted the Union's motion to enforce the award. The court recognized that the question whether the award should be set aside on public policy grounds is "one for resolution by the courts." Pet. App. 17a (quoting *Misco*, 484 U.S. at 43 (citations and internal quotation marks omitted)). The court reviewed a variety of sources—including the DOT regulations and decisions from the First, Fifth, Eighth, and Eleventh Circuits—and determined that "a well defined and dominant public policy exists against the use of controlled substances by those who perform safety sensitive jobs." *Id.* 20a. The court then turned to the question whether the arbitration award requiring reinstatement to a safety-sensitive position of a driver who has twice failed a drug test within 15 months was contrary to that policy.

The court determined that public policy did not warrant vacating the arbitrator's reinstatement award because "the DOT Regulations do not *require* that employees who test positive for drug use be automatically discharged." *Id.* 20a-21a (emphasis added). The District Court held that the public policy exception to enforcement of arbitration awards could not be invoked "[b]ecause the DOT Regulations do not make it *illegal* to reinstate employees who test positive for drug use." *Id.* 21a (emphasis added). As the court con-

cluded: "Consequently, the public policy exception does not apply inasmuch as the arbitrator's award is consistent with the DOT Regulations." *Id.*

On appeal, EACC reiterated its position that the arbitrator's award should be vacated because it contravenes the well defined and dominant public policy that justifies the establishment of alcohol and drug testing programs for commercial drivers in the first place. *See* EACC Ct. App. Br. 18-23; Reply Br. 11-14. The Union agreed with the District Court that public policy could not be invoked to overturn the order reinstating Smith because the DOT regulations do not themselves require his discharge or bar his reinstatement. *See* Union Ct. App. Br. 9, 26. The Fourth Circuit found that "the district court correctly decided the issues before it," and affirmed "on the reasoning of the district court." Pet. App. 4a. EACC's timely petition for rehearing and rehearing en banc was denied, *id.* 22a, and EACC petitioned for certiorari. That petition was granted on March 20, 2000. 120 S. Ct. 1416.

SUMMARY OF ARGUMENT

I. This Court has long recognized that it retains the authority, indeed the obligation, to decline to enforce a private agreement that is contrary to public policy. This fundamental principle—deeply rooted in the common law—has never been limited to contracts that are illegal or require unlawful conduct, but has always extended to agreements that "violate law *or* public policy." *Misco*, 484 U.S. at 42 (emphasis added). To be sure, this Court has carefully confined the public policy doctrine by insisting that the public policy invoked be "well defined and dominant" and "be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *Id.* at 43 (quotations omitted). That safeguard, however, has never been understood to limit courts to those violations of public policy that have been anticipated by

legislatures or regulatory authorities and prohibited by positive law. *See* Restatement (Second) of Contracts § 178(1) (1981).

These principles are fully applicable to arbitration awards entered pursuant to collective bargaining agreements. As this Court has explained, a court may refuse "to enforce an arbitrator's award under a collective-bargaining agreement because it is contrary to public policy;" this is but "a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy." *Misco*, 484 U.S. at 42. Courts typically defer to labor arbitration awards, but the grounds for such deference—the agreement of the parties to be bound by the arbitrator's decision, and the arbitrator's presumed expertise in the law of the shop and the construction of the agreement—are wholly inapplicable when it comes to assessing the impact of an award on third parties and the public interest. As this Court has made clear, "the question of public policy is ultimately one for resolution by the courts." *Id.* at 43 (quotation omitted).

The courts below, however, concluded that the public policy exception "does not apply" because the arbitrator's award was not illegal. Pet. App. 20a-21a. This Court's cases make clear that such a view of the exception is unduly narrow. The judgment below may be vacated on that ground alone, and the case remanded for the courts below to consider whether the award contravenes well defined and dominant public policy, even though it is not illegal and does not require unlawful conduct.

II. The result of a proper consideration of the public policy doctrine—whether undertaken in the first instance by this Court or the courts below—should be clear. It was undisputed below that there is a well defined and dominant public policy against the performance of safety-sensitive jobs by those under the influence of illegal drugs. The Union argued

that this policy was not implicated in this case, however, because the driver "simply test[ed] positive for drugs." But Congress and the Executive have made clear that the distinction the Union would draw cannot stand. In the Testing Act and the regulations issued pursuant to it, the political branches have specified that, with respect to certain positions directly affecting the safety of the traveling public, the policy against performing safety-sensitive jobs while impaired must be expanded to a policy against the holding of those positions by individuals who use drugs—"whether on duty or off duty." Testing Act, § 2(3), 105 Stat. 953. That policy is directly implicated by a driver who "simply tests positive for drugs."

That does not necessarily mean that every reinstatement award violates public policy. Whether a particular award does so depends upon an assessment of the extent of the threatened harm, the probability that the reinstated employee will engage in the dangerous conduct, and the broader impact reinstatement will have on the deterrent effect of the testing regime mandated by Congress. Here the threat to public safety is clear: Smith operates heavy equipment on the public highways. The prospect that he will use drugs again is also high: Smith is a repeat offender, and neither a prior brush with termination, nor participation in a rehabilitation program, nor the clear knowledge that he was subject to testing sufficed to deter further drug use. What is more, in ordering reinstatement the arbitrator never found that Smith was unlikely to use drugs again, simply that he had an explanation for his relapse. Finally, the deleterious impact on the testing program mandated by Congress is clear: Smith's reinstatement undermines the key deterrent force of that program, and will inevitably lead other employees to believe that they, too, are entitled to not only a second but a *third* chance before they need take the prohibition on drug use seriously.

The arbitrator's award returning Smith to his safety-sensitive position therefore violates public policy and should not be enforced. The fact that the arbitrator has interpreted the collective bargaining agreement to allow reinstatement is not dispositive; that simply poses the question to be answered by application of the public policy doctrine. Nor is it determinative that the testing regulations allow reinstatement. Those regulations do not expressly address the case of a repeat offender, and specifically provide that drivers who fail drug tests—even first-time offenders—may be subject to consequences in addition to those specified in the regulations. Those consequences include application of the public policy doctrine to any arbitral award ordering reinstatement.

ARGUMENT

I. AN ARBITRATOR'S AWARD NEED NOT VIOLATE POSITIVE LAW BEFORE IT MAY BE SET ASIDE AS VIOLATING WELL DEFINED AND DOMINANT PUBLIC POLICY.

In *Misco*, this Court granted certiorari to decide, but did not reach, the question whether a court may refuse to enforce an arbitration award on the ground that it violates public policy only when the award itself violates a statute, regulation, or some other manifestation of positive law. *See* 484 U.S. at 45 n.12; *id.* at 46 (Blackmun, J., concurring). The question left open in *Misco* is the first question presented here.

The courts below erred in answering that question. The District Court concluded that "the public policy exception does not apply inasmuch as the arbitrator's award is consistent with the DOT Regulations." Pet. App. 21a. In the court's view, Smith's reinstatement by the arbitrator did not violate public policy "[b]ecause the DOT Regulations *do not make it illegal* to reinstate employees who test positive for drug use." *Id.* (emphasis added). In other words, in the language of the question presented in *Misco*, the District Court held that since the arbitration award was not contrary

to positive law, there was no affront to public policy. The Court of Appeals adopted that reasoning as its own. *Id.* 4a. That view, as shown below, is quite wrong.

A. It Is Well Established That A Court Will Not Enforce A Contract Contrary To Public Policy.

As well settled as any proposition in the law of contracts is the rule that courts will not enforce otherwise valid agreements if doing so would be contrary to public policy. *See* Restatement (Second) of Contracts (hereinafter, "Restatement"), Chapter 8 (1981) ("Unenforceability on Grounds of Public Policy"). The public policy doctrine has been recognized and applied in this Court's cases for well over a century. *See, e.g., Sprott* v. *United States*, 87 U.S. 459, 463 (1874) ("The proposition that there is in many cases a public policy which forbids courts of justice to allow any validity to contracts because of their tendency to affect injuriously the highest public interests, * * * is too well settled to admit of dispute."); *Trist* v. *Child*, 88 U.S. 441, 448 (1874) (the doctrine "is a rule of the common law of universal application"); *Meguire* v. *Corwine*, 101 U.S. 108, 111 (1879) (doctrine is so well settled that "to go over the same ground again * * * would be a waste of time"); *President of the Bank of the United States* v. *Owens*, 27 U.S. 527, 539 (1829) ("To enumerate here all the instances and cases in which this reasoning has been practically applied, would be to incur the imputation of vain parade.").[3] Although this Court now

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[3] The doctrine is an ancient one, the roots of which can be traced to the early common law—and beyond. *See* Percy H. Winfield, *Public Policy in the English Common Law*, 42 Harv. L. Rev. 76 (1928) (examining the doctrine from the Fourteenth Century); *Trist* v. *Child*, 88 U.S. at 448 ("In the Roman law it was declared that 'a promise made to effect a base purpose, as to commit homicide or sacrilege, is not binding.'") (quoting Institutes of Justinian, lib. 3., tit. 19, par. 24). The Court in *McMullen* v. *Hoffman*, 174 U.S. 639, 654 (1899), noted that "[a]bout the earliest illustration of this doctrine is * * * the famous case of *The Highwayman*. It is stated

decides fewer contract cases than it once did, its modern cases leave no doubt that the doctrine is alive and well. *See, e.g.*, *Misco*, 484 U.S. at 42-43; *Town of Newton* v. *Rumery*, 480 U.S. 386, 392 (1987); *Hurd* v. *Hodge*, 334 U.S. 24, 34-36 (1948).[4]

The public policy doctrine is based in part on "the basic notion that no court will lend its aid to one who founds a cause of action on an immoral or illegal act." *Misco*, 484 U.S. at 42. *See Hurd* v. *Hodge*, 334 U.S. at 35 (where enforcement of contract would violate public policy, "it is the obligation of courts to refrain from such exertions of judicial power"); *Ritter* v. *Mutual Life Ins. Co.*, 169 U.S. 139, 154 (1898) ("A contract, the tendency of which is to endanger the public interests or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice, or be made the foundation of its judgment."); *Owens*, 27 U.S. at 538 ("no court of justice can in its nature be made the handmaid of iniquity"); Restatement, Introductory Note to Chapter 8 ("enforcement of the promise may be an inappropriate use of the judicial process in carrying out an unsavory transaction").

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that Lord Kenyon once said, by way of illustration, that he would not sit to take an account between two robbers on Hounslow Heath, and it was questioned whether the legend in regard to the highwayman did not arise from that saying. It seems, however, that the case was a real one."

[4] Even in the era of *Lochner* v. *New York*, 198 U.S. 45 (1905), the high watermark of contractual liberty in this country, the Court did not waver from the rule that a contract contrary to public policy is invalid, even as it declared numerous statutes to be unconstitutional for impinging upon the freedom of private individuals to contract as they please. *See, e.g.*, *Hazelton* v. *Scheckells*, 202 U.S. 71 (1906) (Holmes, J.) (applying the public policy doctrine).

The doctrine is also premised on the fact that, when a court is asked to enforce a private agreement, it has a duty to protect those who are affected by, but not parties to, the contract. As this Court said in *Misco*, "the public's interests in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements." 484 U.S. at 42. *See also Seymour* v. *Blue Cross/Blue Shield*, 988 F.2d 1020, 1023 (10th Cir. 1993) (doctrine derives "from the public's interest in having its views represented in matters to which it is not a party but which could harm the public interest"). *Cf. Martin* v. *Wilks*, 490 U.S. 755, 761 (1989) (referring to " 'the policy against requiring third parties to submit to bargains in which their interests were either ignored or sacrificed' ") (quoting the Court of Appeals).

B. The Public Policy Exception To Enforcement Of Contracts Is Not Limited To Contracts That Violate Positive Law.

This Court has *never* held, or even said, that a contract must actually contravene the terms of a statute or other positive law before it may be said to violate public policy. On the contrary, the Court has indicated time and again that the public policy doctrine is not so confined. In the leading case of *Marshall* v. *Baltimore & Ohio Railroad*, 57 U.S. 314 (1853), the Court said:

> It is an undoubted principle of the common law, that it will not lend its aid to enforce a contract to do an act that is illegal; *or* which is inconsistent with sound morals or public policy; or which tends to corrupt or contaminate, by improper influences, the integrity of our social or political institutions. [*Id.* at 334 (emphasis added).]

See also Walworth v. *Kneeland*, 56 U.S. 348, 353 (1853) ("a contract, forbidden by an act of Congress, *or against its policy*," is void) (emphasis added); *Trist* v. *Child*, 88 U.S. at

448 ("In our jurisprudence a contract may be illegal and void because it is contrary to a constitution or statute, *or* inconsistent with sound policy and good morals.") (emphasis added); *Meguire* v. *Corwine*, 101 U.S. at 111 ("Whether forbidden by a statute *or condemned by public policy*, the result is the same.") (emphasis added).

In *The Kensington*, 183 U.S. 263 (1902), Mrs. Bleeker and her daughter booked passage on a steamer bound for New York from Antwerp. The voyage was rough, and on arrival in America the Bleekers' luggage, which had been stowed in upper steerage, "was found to be totally destroyed." *Id.* at 264. "By constant shifting, it had been reduced to an almost unrecognizable mass, was commingled with debris of broken china and straw, and covered with water." *Id.* The Bleekers' ticket limited the ship's liability to 250 francs pursuant to Belgian law, but this Court held the limitation on liability void as against public policy. The holding is noteworthy, for the Court specifically rejected "the suggestion that, because there is no statute expressly prohibiting such contracts * * * therefore they should be enforced." *Id.* at 270.[5]

More recently, in *Hurd* v. *Hodge*, 334 U.S. 24 (1948), a companion case to *Shelley* v. *Kraemer*, 334 U.S. 1 (1948), the Court held that judicial enforcement of a racially discriminatory restrictive covenant in the District of Columbia would contravene public policy. The Court based its decision on the fact that, were a state court to enforce such a covenant, its action would violate the Equal Protection Clause of the Fourteenth Amendment. *See Hurd*, 334 U.S. at 35-36 (citing *Shelley*). *Hurd* is highly instructive because the Fourteenth Amendment did not apply in that case—it of course applies only to the States—and the Fifth Amend-

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[5] *See also Owens*, 27 U.S. at 540 ("Nor is the rule applicable only to contracts expressly forbidden; for it is extended to such as are calculated to affect the general interest and policy of the country.").

ment—which does apply to the District of Columbia—had not yet been construed to contain an equal protection component. *See Bolling* v. *Sharpe*, 347 U.S. 497 (1954). Thus, this Court in *Hurd* concluded that enforcement of the covenant would contradict public policy even though it would violate no applicable constitutional provision.

In *Town of Newton* v. *Rumery*, 480 U.S. 386 (1987), the First Circuit had adopted a *per se* rule that so-called release-dismissal agreements—wherein a criminal defendant contracts away the right to sue under 42 U.S.C. § 1983 for constitutional violations in exchange for the prosecutor's dropping of charges—violated public policy and were unenforceable. Although this Court disagreed, its approach to the issue is important. Nothing in Section 1983 prohibits release-dismissal agreements, but the Court did not reverse on that basis or even mention that fact. Instead, the Court explained that "[t]he relevant principle is well established: a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." 480 U.S. at 392 (citing Restatement § 178(1)). The Court then went on to balance the competing policy considerations implicated by release-dismissal agreements. Central to the Court's holding that such agreements are not unlawful *per se* was the fact that the right to file a Section 1983 suit is a private right, the waiver of which does not substantially impair any interests of the public at large. *See id.* at 394-396.

The provision of the Restatement favorably cited in *Town of Newton* states in full: "A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable *or* the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms." Restatement § 178(1) (emphasis added). *See also id.* § 179 ("A public policy against the enforcement of promises or other terms may be derived by the court from (a) legislation

relevant to such a policy, or (b) the need to protect some aspect of the public welfare * * *."). And the Restatement's official commentary specifically observes that

> even though a field is the subject of legislation, a court may decide that the legislature has not entirely occupied the field and may refuse to enforce a term on grounds of a judicially developed public policy *even though there is no contravention of the legislation.* [*Id.* § 179, comment b (emphasis added).]

See also id. (in many public policy cases "legislation is significant, not as controlling the disposition of the case, but as enlightening the court concerning some specific policy to which it is relevant").

The leading treatises are in accord with the Restatement. According to Professor Williston, "bargains are illegal if they violate an express provision of positive law *or* the purpose of positive law, though not expressly prohibited, *or* if they are otherwise inimical to public policy." 5 *Williston on Contracts* § 12:1, at 559 (4th ed. 1993) (emphasis added); *see also id.* at 546 ("Illegal bargains" include "those opposed to positive law, those which are contrary to morality, *and* those which offend public policy") (emphasis added). Similarly, Professor Corbin writes that "[s]ome judges have thought that they must look solely to constitutions and statutes and to earlier decisions interpreting and applying them as the sources from which they may determine what public policy requires. This is far from true, even though they are the sources that are first to be considered and that often may be conclusive." 6A *Corbin on Contracts* § 1375, at 15 (1962). *See also id.* § 1374, at 6 ("Public Policy" is "another source of 'illegality,' besides statute and judicial decision").[6]

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[6] One scholar has noted that the public policy doctrine applies, not only to illegal contracts, but also to contracts that "(1) offend constitutional and statutory policies; (2) harm marriage or domestic relations; (3) injure the rights of third parties; (4) exculpate,

For their part, lower courts have often refused to enforce contracts deemed to violate public policy, but not positive law.[7] In *Shadis* v. *Beal*, for example, the Third Circuit specifically rejected the argument that a contract must "be 'illegal' in a literal sense before it could be invalid," noting that "the scope of the public policy doctrine is broader and more encompassing than the concept of illegality." 685 F.2d at 833. The court also observed that, under the Restatement, "it is sufficient if the legislature makes an adequate declaration of public policy which is inconsistent with the contract's terms." *Id.* at 833-834.

Finally, it must be recognized that adopting a rule that a contract must violate positive law to trigger the public policy doctrine would have the effect of nullifying the doctrine. The role of courts under such a rule would be limited to determining whether a contract called for illegal action; there

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indemnify, or otherwise restrict recovery of damages for negligence; (5) abridge a fiduciary duty; (6) restrict access to the courts or obstruct the administration of justice; or (7) restrain trade." G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 Cal. L. Rev. 431, 441 (1993).

[7] *See, e.g.*, *Davies* v. *Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1396-1400 (9th Cir.) (settlement agreement restricting right to run for elective office), *cert. denied*, 501 U.S. 1252 (1991); *Shadis* v. *Beal*, 685 F.2d 824, 833-834 (3d Cir.) (contract prohibiting state-funded legal services provider from seeking or receiving attorney's fees in suits against the state), *cert. denied*, 459 U.S. 970 (1982); *McBrearty* v. *United States Taxpayers Union*, 668 F.2d 450, 451 (8th Cir. 1982) (contract to pay certain expenses incurred by member of tax protest organization should he be incarcerated); *Walters* v. *Fullwood*, 675 F. Supp. 155, 160 (S.D.N.Y. 1987) (contract between college athlete and professional sports agents in violation of NCAA rules); *Capazzoli* v. *Holzwasser*, 490 N.E.2d 420, 422 (Mass. 1986) (promise by man to support woman in exchange for her promise to abandon her marriage to another man).

would be no "public policy" left for courts to apply. *See, e.g.*, Bret F. Randall, Comment, *The History, Application, and Policy of the Judicially Created Standards of Review for Arbitration Awards*, 1992 B.Y.U. L. Rev. 759, 782 (positive law rule "robs the public policy exception of all its substance"). As shown above, the adoption of such a rule would fly in the face of centuries of contract law, the Restatement, and the view of scholars. And what is perhaps most troubling, that rule would compel federal courts to give their imprimatur to *any* private agreement, no matter how odious or injurious to the public, so long as it did not run afoul of a specific statutory provision. That has never been, and should not be, the law.

There is no question that the public policy doctrine is strong medicine, and should be carefully and sparingly invoked. This Court long ago circumscribed the doctrine with appropriately rigorous standards, explaining that "[p]ublic policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. * * * [T]here must be found definite indications in the law of the sovereignty to justify the invalidation of a contract as contrary to public policy." *Muschany* v. *United States*, 324 U.S. 49, 66 (1945). Within these limits, however, courts retain the authority to decline to enforce contracts that are contrary to public policy, whether or not those contracts are themselves illegal or require unlawful conduct.[8]

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[8] An English jurist famously remarked nearly two centuries ago that public policy "is a very unruly horse, and when once you get astride it you never know where it will carry you." *Richardson* v. *Mellish*, 2 Bing. 229, 252, 130 Eng. Rep. 294, 303 (1824) (Burrough, J.). But Professor Corbin has aptly rejoined that "however unruly the horse may be, it is not possible for the courts to refuse to ride." 6A *Corbin on Contracts* § 1375, at 11-12 n.9.

C. The Public Policy Doctrine Applies To Labor Arbitration Awards.

1. This Court has made clear that the public policy doctrine is fully applicable in the labor relations context. *See W.R. Grace & Co.* v. *Local Union 759, Int'l Union of Rubberworkers*,. 461 U.S. 757, 766 (1983) ("As with any contract, * * * a court may not enforce a collective bargaining agreement that is contrary to public policy."); *Misco*, 484 U.S. at 43 (same). Thus, it is settled that a court may refuse "to enforce an arbitrator's award under a collective-bargaining agreement because it is contrary to public policy"; this is but "a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy." *Id.* at 42. *See also W.R. Grace*, 461 U.S. at 766 ("If the contract as interpreted by [arbitrator] Barrett violates some explicit public policy, we are obliged to refrain from enforcing it.").[9] And whether or not an arbitrator purports to take the public interest into consideration, "the question of public policy is ultimately one for resolution by the courts." *Id.*

In *W.R. Grace*, this Court confirmed that any public policy sufficient to override an arbitral award "must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" *Id.* (quoting *Muschany*, 324 U.S. at 66). Thus, in considering the company's claim

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[9] The public policy doctrine does not favor one side or the other in labor disputes; it can be invoked to aid employees as well as employers. *See, e.g., Local No. P-1236* v. *Jones Dairy Farm*, 680 F.2d 1142, 1144-45 (7th Cir. 1982) (company work rule held to be against public policy). *See also National Licorice Co.* v. *NLRB*, 309 U.S. 350, 360 (1940) (employer could not enforce contractual provision executed with individual employees; provision was "in plain conflict with the public policy of the [National Labor Relations] Act to encourage the procedure of collective bargaining").

that enforcement of such an award would violate public policy, the Court proceeded to examine two "important" public policies (461 U.S. at 766, 770)—obedience to court orders and voluntary compliance with Title VII—concluding ultimately that these policies would not be violated by enforcement of the award.

In *Misco*, this Court reaffirmed what it had said in *W.R. Grace*—"that 'a court may not enforce a collective-bargaining agreement that is contrary to public policy,' and * * * that 'the question of public policy is ultimately one for resolution by the courts.'" 484 U.S. at 43 (quoting *W.R. Grace*, 461 U.S. at 766). In *Misco*, the Fifth Circuit had refused to enforce an arbitration award based on what it described as the public policy "against the operation of dangerous machinery while under the influence of drugs." *Id.* at 44. This Court—without agreeing or disagreeing that such a public policy exists—held that the Fifth Circuit had not complied with the command of *W.R. Grace* because the court "made no attempt to review existing laws and legal precedents in order to demonstrate that they establish a 'well-defined and dominant' public policy." *Id.* *Misco* and *W.R. Grace* thus leave no doubt that it is the proper role and duty of courts to consider the public policy ramifications of labor arbitration awards before lending their authority to enforce them.[10]

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[10] This Court has also recognized the applicability in the labor relations context of the related doctrine that courts will not enforce illegal contracts. In *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72 (1982), the Court held that a coal producer was entitled to have a court adjudicate its claim that part of its collective bargaining agreement with the UMWA was in violation of, *inter alia*, the Sherman Act and hence unenforceable. The Court noted that "[t]here is no statutory code of federal contract law, but our cases leave no doubt that illegal promises will not be enforced in cases controlled by the federal law," and also added that it is "well established" that "a federal court has a duty to determine whether a

2. Although public policy must be determined *by reference* to laws and legal precedents, that does not mean that an arbitrator's award must actually contravene the terms of a statute or other positive law before it may be said to violate public policy. Indeed, the majority of federal circuit courts that have considered the question have rejected the positive law requirement in applying the public policy doctrine to arbitration awards under collective bargaining agreements—just as such a requirement has been rejected as a general matter in applying the doctrine.[11]

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contract violates federal law before enforcing it." *Id.* at 77, 83. The Court even drew upon the public policy doctrine in support of this holding. *See id.* at 77-78 & n.4.

[11] *See Exxon Shipping Co.* v. *Exxon Seamen's Union*, 73 F.3d 1287, 1293-95 (3d Cir.) ("*Exxon III*"), *cert. denied*, 517 U.S. 1251 (1996); *Exxon Shipping Co.* v. *Exxon Seamen's Union*, 11 F.3d 1189, 1192 (3d Cir. 1993) ("*Exxon II*"); *Exxon Shipping Co.* v. *Exxon Seamen's Union*, 993 F.2d 357, 363 (3d Cir. 1993) ("*Exxon I*"); *Gulf Coast Indus. Workers Union* v. *Exxon Co., U.S.A.*, 991 F.2d 244, 250 n.7 (5th Cir.) ("*Gulf Coast*"), *cert. denied*, 510 U.S. 965 (1993); *Iowa Elec. Light & Power Co.* v. *Local Union 204, IBEW*, 834 F.2d 1424, 1427-28 n.3 (8th Cir. 1987) ("*Iowa Electric*"); *E.I. DuPont de Nemours & Co.* v. *Grasselli Employees Indep. Ass'n*, 790 F.2d 611, 616 (7th Cir.) ("*DuPont*"), *cert. denied*, 479 U.S. 853 (1986); *United States Postal Serv.* v. *American Postal Workers Union*, 736 F.2d 822, 824 (1st Cir. 1984) ("*Postal Service*"). *But see Westvaco Corp.* v. *United Paperworkers Int'l Union*, 171 F.3d 971, 977 (4th Cir. 1999); *United Food & Commercial Workers Int'l Union, Local 588* v. *Foster Poultry Farms*, 74 F.3d 169, 174 (9th Cir. 1996); *United States Postal Serv.* v. *National Ass'n of Letter Carriers*, 810 F.2d 1239, 1241 (D.C. Cir. 1987), *cert. dismissed*, 485 U.S. 680 (1988); *Northwest Airlines, Inc.* v. *Air Line Pilots Ass'n, Int'l*, 808 F.2d 76, 83 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1014 (1988); *American Postal Workers Union* v. *United States Postal Serv.*, 789 F.2d 1, 8 (D.C. Cir. 1986).

In the First Circuit's *Postal Service* case, "[t]he heart of the Union's argument [was] that although there may be a public policy against embezzling Postal Service funds, there is no public policy against the Postal Service employing convicted embezzlers." 736 F.2d at 824. Rejecting that argument, the First Circuit held that there need not be a "direct legal prohibition" against reinstatement before a court may apply the public policy doctrine. *Id.* Nine years later, the Third Circuit also rejected the rule that an arbitrator's award "only violates public policy where it contravenes a rule of positive law which forbids reinstatement of the employee" and held instead that "[t]he broader test adopted by the First, Sixth, Seventh, and Eighth Circuits appears to be the sounder approach to the question whether an arbitration award violates public policy." *Exxon I*, 993 F.2d at 363. That same week, the Fifth Circuit joined the list. *See Gulf Coast*, 991 F.2d at 250 n.7.

The courts that have rejected the positive law rule have emphasized four reasons. First, they have noted the lack of precedent for such a rule. *See DuPont*, 790 F.2d at 616 ("the courts have never construed the public policy exception so narrowly"). Second, they have recognized that even when the reinstatement of a discharged worker does not violate any specific law or regulation, it can nevertheless undermine the purpose and impair the effectiveness of a regulatory scheme aimed at public safety. *See, e.g., Exxon I*, 993 F.2d at 364 (reinstatement of oil tanker helmsman who failed drug test after his ship ran aground would violate no positive law but "would thwart achievement of the overriding interest in public safety furthered by the regulations"); *Exxon III*, 73 F.3d at 1295 (reinstatement of seaman who refused for-cause drug test would be legally permissible but "would violate public policy because it would undercut enforcement of Coast Guard regulations and environmental statutes"). Third, courts have recognized that, with the positive law rule, there would no longer be a public policy doctrine. *See AFSCME* v.

Department of Cent. Management Servs., 671 N.E.2d 668, 679 (Ill. 1996) ("We believe that a bright-line test requiring that the award itself violate an *explicit* law has the potential to swallow the public policy exception.") (emphasis in original); *see also Stead Motors of Walnut Creek* v. *Automotive Machinists Lodge No. 1173*, 886 F.2d 1200, 1222 (9th Cir. 1989) (en banc) (Trott, J., dissenting) (broader approach "gives life to the public policy exception rather than suffocating it beyond resuscitation"), *cert. denied*, 495 U.S. 946 (1990). Finally, courts have noted the unacceptable consequences of the positive law rule: the judiciary would be "powerless" (*Gulf Coast*, 991 F.2d at 253) to set aside and must instead enforce an arbitrator's decision to reinstate, for example, employees who piloted an airline or drove a truck while drug-impaired or intoxicated—even in the most egregious case. *See, e.g., Exxon II*, 11 F.3d at 1193-94; *DuPont*, 790 F.2d at 616; *Postal Service*, 736 F.2d at 824-825.

3. It will surely be argued here that using the public policy doctrine to nullify a labor arbitration award that violates no positive law is itself inconsistent with another national policy—*i.e.*, the policy of the labor laws favoring collective bargaining, arbitration of labor disputes, and limited judicial review of arbitral decisions. That objection is misguided, for several reasons.

To begin with, in most cases a court does not, and should not, second-guess the decision of an arbitrator because that decision, however questionable it may be, is what the parties bargained for. But such an abdication of the traditional judicial role has no place when an arbitrator's decision adversely affects a third party who has not consented to the collective bargaining agreement. When an arbitration award threatens public safety or some other well defined public policy, respect for private contractual arrangements supplies no basis for courts to withhold close scrutiny of such awards. *See Misco*, 484 U.S. at 42 ("the public's interests in confin-

ing the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements"); *Jones Dairy Farm*, 680 F.2d at 1144 (arbitration award "affects not only the Company and its employees but also the consuming public which does not participate in the arbitration but which nonetheless has a very real interest in insuring that meat and meat products are processed under sanitary conditions"); Carie Fox & Brian Gruhn, *Toward a Principled Public Policy Standard: Judicial Review of Arbitrators' Decisions*, 1989 Det. C.L. Rev. 863, 872, 895.

Furthermore, it is ordinarily proper for a court to defer when an arbitrator's decision concerns construction of a collective bargaining agreement, due to the arbitrator's presumed expertise in such matters. But deference is not warranted when public policy is at issue because "the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 57 (1974). *Accord McDonald* v. *City of West Branch*, 466 U.S. 284, 290 (1984). Interpreting labor agreements may be the bailiwick of arbitrators, but "the question of public policy is ultimately one for resolution by the courts." *W.R. Grace*, 461 U.S. at 766.

Finally, because an arbitrator derives authority from the agreement between the parties, an arbitrator usually is not authorized to consider factors external to the agreement itself. *See McDonald*, 466 U.S. at 290-291; *Alexander*, 415 U.S. at 52-54. As this Court explained in *Alexander*, an arbitrator " 'has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties.' " 415 U.S. at 52 n.16 (quoting Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1016 (1955)). The Labor Management Relations Act endorses agreement between the parties on a method for

settling disputes "over the application or interpretation of *an existing collective-bargaining agreement*," 29 U.S.C. § 173(d) (emphasis added)—not over issues of public policy—and the deference due that method is correspondingly limited.

Accordingly, an arbitrator is restricted in taking notions of public policy into account when rendering a decision. *See W.R. Grace*, 461 U.S. at 766 (arbitrator's "view of his own jurisdiction precluded his consideration of this [public policy] question"); *Barrentine* v. *Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 744 (1981) ("Because the arbitrator is required to effectuate the intent of the parties, rather than to enforce the [Fair Labor Standards Act], he may issue a ruling that is inimical to the public policies underlying the FLSA * * *."); *Iowa Electric*, 834 F.2d at 1427 ("collective bargaining agreements do not formulate public policy, and arbitrators cannot consider matters not encompassed by the governing agreements"); *Jones Dairy Farm*, 680 F.2d at 1144 ("Public policy considerations are wholly independent of the collective bargaining agreement."). Since arbitrators do not consider public policy, courts must.

The foregoing is fully consistent with this Court's seminal *Steelworkers* trilogy.[12] In those cases, in which the Court held that it is proper for courts to refuse to review the merits of an arbitration award under a collective bargaining agreement, the Court stressed that the expertise of labor arbitrators resides "at the plant level." *Enterprise Wheel*, 363 U.S. at 596. "They sit to settle disputes * * * that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry * * *." *Id.* The Court also relied on the fact that the power of a labor arbitrator "is

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[12] *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960).

confined to interpretation and application of the collective bargaining agreement"; "his award is legitimate only so long as it draws its essence" from that agreement. *Id.* at 597. Nothing about the application of the public policy doctrine at issue here undermines these settled authorities; the doctrine in fact picks up where the strong policy favoring arbitration leaves off—when the effects of the pro-arbitration policy are visited on those who are not a part of the process.[13]

In sum, it does not undermine the collective bargaining and arbitration processes to have courts review arbitration awards—just as they have always reviewed other contracts—for violation of public policy.

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[13] *Wright* v. *Universal Maritime Service Corp.*, 525 U.S. 70 (1998), noted that, after *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), it is an open question whether a union may waive an employee's right to a judicial forum for federal statutory claims through a collective bargaining agreement ("CBA") that requires arbitration of such claims. The *Wright* Court did not resolve that question, 525 U.S. at 77, but even if the answer were yes, it could hardly be contended that a union has the authority to waive the rights of *non*-workers or otherwise contract against the public interest. *See Gilmer*, 500 U.S. at 34 ("a labor arbitrator has authority only to resolve questions of contract rights").

Additionally, *Wright* explained that the presumption in labor law that claims are arbitrable "does not extend beyond the reach of the principal rationale that justifies it, which is that arbitrators are in a better position than courts *to interpret the terms of a CBA*. * * * The dispute in the present case, however, ultimately concerns not the application or interpretation of any CBA, but the meaning of a federal statute." 525 U.S. at 78-79 (emphasis in original). Likewise, the public policy doctrine does not involve CBA interpretation but rather requires courts to make judgments with reference to relevant statutes, regulations, and precedents.

D. The Decision Of The Court of Appeals Cannot Stand.

In this case, the courts below upheld Smith's reinstatement over public policy objections on the ground that the DOT regulations "do not require" that he be discharged and "do not make it illegal" for him to get his job back. Pet. App. 20a-21a. If this Court agrees with petitioner on the first question presented and rules that courts asked to vacate arbitration awards on public policy grounds are *not* limited to asking whether the award violates positive law or requires unlawful conduct, then the courts below considered this case under an erroneous view of the law. In this circumstance, the Court could remand the case for consideration of the public policy issue by the District Court and the Court of Appeals under the correct view of the law. *See Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 237 (1995) (concluding, after determining applicable legal test, that it would be "best to remand the case to the lower courts for further consideration in light of the principles we have announced"). *See also NCAA* v. *Smith*, 525 U.S. 459, 470 (1999) ("we do not decide in the first instance issues not decided below"); *United States* v. *Bestfoods*, 524 U.S. 51, 72-73 (1998) (declining to "decid[e] in the first instance an issue on which the trial and appellate courts did not focus").

The Court could also conclude, however, that the issue is ripe for resolution now. Numerous courts not hobbled by an erroneous view on the positive law question have examined the public policy against drug use by those in safety-sensitive positions and have concluded that the policy would be violated by the arbitral reinstatement orders at issue in those cases. *See supra* note 11. As detailed below, moreover, the sources for this policy are readily available laws and regulations, and the reinstatement order at issue here plainly contravenes that policy. Thus, there is no need to remand for consideration of the public policy question in the first instance by the courts below under a proper understanding of

the scope of the public policy doctrine. We therefore proceed to address the question whether it violates well defined and dominant public policy to put Smith—who failed two drug tests in 15 months—back behind the wheel of a 55,000 pound truck traveling the West Virginia roads.

II. ENFORCEMENT OF THE REINSTATEMENT AWARD IS CONTRARY TO WELL DEFINED AND DOMINANT PUBLIC POLICY.

In *Misco*, this Court criticized the Fifth Circuit because it had "made no attempt to review existing laws and legal precedents in order to demonstrate that they establish a 'well-defined and dominant' policy against the operation of dangerous machinery while under the influence of drugs." 484 U.S. at 44.[14] This was not to say that no such policy could have been identified had the court undertaken the appropriate inquiry. The Court acknowledged that "certainly" such a policy "is firmly rooted in common sense"; the failure of the lower court was in not grounding its formulation of that common-sense policy " 'by reference to the laws and legal precedents.' " *Id.* (quoting *W.R. Grace*, 461 U.S. at 766 (quoting *Muschany*, 324 U.S. at 66)).

As we explain below, the public policy implicated in this case is readily grounded in such authorities, and is plainly violated by enforcement of the award reinstating Smith to his safety-sensitive position.

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[14] The *Misco* Court was also concerned about the circuit court's refusal to accept the arbitrator's determination that the evidence was insufficient to show the employee's drug use. *See* 484 U.S. at 39-42. Here, by contrast, the Union has never disputed the accuracy of the two drug tests Smith failed, and the arbitrator accepted the Union's position that "the grievant is guilty as charged." Pet. App. 27a.

A. There Is An Undisputed Well Defined and Dominant Public Policy—Derived From Legislation, Regulation, And Precedent—Against Employees Performing Safety-Sensitive Jobs While Under The Influence Of Illegal Drugs.

At the most general level, it is clear that there is today a well defined and dominant public policy, "ascertained by reference to the laws and legal precedents," *Misco*, 484 U.S. at 44 (quotations omitted), against drug use in the workplace. *See, e.g.*, Drug-Free Workplace Act of 1988, 41 U.S.C. § 701 (imposing drug-free workplace requirements on federal contractors); Drug-Free Workplace Act of 1998, 15 U.S.C. § 654 (providing assistance for small businesses to establish drug-free workplace programs); Executive Order No. 12564, 5 U.S.C. § 7301 note (1986) (prohibiting drug use by federal employees and mandating testing program for certain positions). *See also Gulf Coast*, 991 F.2d at 250 ("There are countless statutes, regulations, company guidelines, and judicial decisions that pronounce the emphatic national desire to eradicate illicit drugs from the workplace.").

Both the strength of that policy and its grounding in laws and legal precedents are intensified and focused with respect to those in safety-sensitive positions, particularly in the transportation industry—where employees under the influence of drugs endanger both co-workers and large numbers of innocent third parties.[15] Indeed, only two years after

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[15] Protecting the safety of the traveling public has long been a recognized basis for invocation of the public policy exception. *See, e.g., Baltimore & Ohio S.W. Ry.* v. *Voigt*, 176 U.S. 498, 506 (1900) (doctrine gives effect to "the importance which the law justly attaches to human life and personal safety"); *Chicago, St. Louis & New Orleans R.R.* v. *Pullman Southern Car Co.*, 139 U.S. 79, 90 (1891) ("It is * * * a fundamental condition in all such [common carrier] contracts that their provisions must not be injurious to the public."); *NLRB* v. *Dixie Motor Coach Corp.*, 128 F.2d 201, 203 (5th Cir. 1942) ("The public interest * * * requires of any one entrusted with the lives and safety of the travelling

Misco was decided, this Court recognized that the "governmental interest in ensuring the safety of the travelling public and of the employees themselves plainly justifies prohibiting covered employees from using alcohol or drugs on duty, or while subject to being called for duty." *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 621 (1989).[16] And a decade after *Misco*, the First Circuit was able to state—in a case involving drug use by a truck driver responsible for "a five-axle tractor-trailer combination which, when fully loaded, carries 12,000 gallons of highly flammable motor fuel" through densely populated areas—that "society has achieved a broad national consensus that persons should not be allowed to endanger others while laboring under the influence of drugs," and that "[t]here is a plenitude of positive law to support the existence of a well defined and dominant public policy against the performance of safety-sensitive jobs while under the influence of drugs * * *." *Exxon Corp.* v. *Esso Workers' Union, Inc.*, 118 F.3d 841, 843, 848, 846-847 (1st Cir. 1997). The First Circuit found that "[j]udicial decisions, agency regulations, and legislative enactments combine to form a solid phalanx of positive law evidencing" such a public policy. *Id.* at 849.

Reflecting the strength of this consensus, there was no dispute in the courts below that there is a well defined and dominant public policy against the performance of safety-sensitive jobs by employees who are actually under the

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public that he conduct himself in a manner in keeping with his responsibilities. * * * The undisputed facts show that this employee's drinking habits * * * place[d] upon his employer the duty to discharge him."). This is an area in which the impact on innocent third parties is particularly direct and tangible, justifying public policy scrutiny of private agreements. *See Misco*, 484 U.S. at 42.

[16] The covered employees required to take drug tests under the program at issue in *Skinner* were railroad workers.

influence of drugs. Pet. App. 18a. In endorsing this conclusion, the District Court (whose opinion was adopted by the Fourth Circuit, *see id.* 4a) cited decisions of the Fifth, Eighth, and Eleventh Circuits.[17] The District Court could also have cited a variety of authorities expressly forbidding on-the-job drug use in industries where public safety is a particular concern. Regulations of the Federal Highway Administration, for example, provide that no driver of a commercial vehicle "shall be on duty and possess, be under the influence of, or use" specified controlled substances. 49 C.F.R. § 392.4(a).[18]

For its part, the Union assumed in the courts below that there exists a "well defined and dominant public policy against employees operating machinery while under the influence of drugs," and therefore never challenged the existence of such a public policy.[19] *See also* Opp. Cert. 4 ("the courts have consistently recognized the public policy against the performance of safety-sensitive jobs by those impaired by drugs"); *id.* at 15-16 (citing cases).

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[17] *See* Pet. App. 18a-19a (citing *Gulf Coast*, *supra* (worker at petrochemical refinery); *Exxon Corp.* v. *Baton Rouge Oil & Chem. Workers Union*, 77 F.3d 850 (5th Cir. 1996) (chemical plant employee); *Union Pac. R.R.* v. *United Transp. Union*, 3 F.3d 255 (8th Cir. 1993) ("*Union Pacific*") (railroad brakeman), *cert. denied*, 510 U.S. 1072 (1994); *Delta Air Lines, Inc.* v. *Air Line Pilots Ass'n Int'l*, 861 F.2d 665 (11th Cir. 1988) (commercial airline pilot), *cert. denied*, 493 U.S. 871 (1989)).

[18] *See also, e.g.*, W. Va. Code § 17C-5-2 (West Virginia criminal statute prohibiting the operation of motor vehicles by those under the influence of controlled substances); W. Va. Code § 17E-1-13(a) (one year disqualification from driving commercial motor vehicle after conviction for driving under the influence of controlled substance).

[19] Reply Brief of District 17 and Local Union 1503 United Mine Workers of America (Dkt. 18) at 3-4.

B. There Is Also A Well Defined And Dominant Public Policy—Derived From Legislation, Regulation, And Precedent—Against Employees In Safety-Sensitive Positions Using Illegal Drugs Whether On Or Off The Job.

The Union did contend that there is no well defined and dominant public policy against performance of a safety-sensitive job by an employee who "simply tests positive for drugs," without evidence of on-the-job impairment.[20] The District Court recognized, however, that some decisions "expand[] th[e] public policy from situations where the employee is shown to be under the influence of drugs to situations where the employee merely tests positive for drugs although there is no evidence that he was under the influence while on the job." Pet. App. 19a (citing *Esso Workers' Union*, *supra*; *Exxon Corp.* v. *Baton Rouge*, *supra*). The District Court endorsed that expanded public policy when it found, based upon its examination of the authorities, "that a well defined and dominant public policy exists against the use of controlled substances by those who perform safety sensitive jobs," *id.* 20a—regardless of whether that use occurs on or off the job.

The public policy against such illegal drug use by those entrusted with safety-sensitive jobs in the transportation industry is not only "firmly rooted in common sense," *Misco*, 484 U.S. at 44; it has also been confirmed by Congress and the Executive. Those branches have made clear that the general policy against illegal drug use, and the particular concern about drug use in the workplace, are heightened when drug use by those in safety-sensitive transportation

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[20] Memorandum in Support of Defendants' and Counterclaimants' Motion for Summary Judgment (Dkt. 11) at 9; Union Ct. App. Br. 25 (same). *See also United Transp. Union* v. *Union Pac. R.R.*, 116 F.3d 430, 434 (9th Cir. 1997) (concluding that public policy not violated by reinstatement of employee who "merely tested positive for drugs").

positions is at issue, to the extent that special legislation and special programs designed to eradicate such use have been enacted.

In particular, Congress has identified those safety-sensitive jobs where the public policy against drug use is at its zenith by requiring that certain transportation workers be subjected to pre-employment, random, reasonable suspicion, and post-accident drug testing. In adopting the Testing Act, Congress made findings that "the use of alcohol and illegal drugs has been * * * proven to have been a critical factor in transportation accidents," and that "the greatest efforts must be expended to eliminate the abuse of alcohol and use of illegal drugs, *whether on duty or off duty*, by those individuals who are involved in the operation of aircraft, trains, trucks, and buses." §§ 2(4), 2(3), 105 Stat. 953 (emphasis added). Finding that "the most effective deterrent to abuse of alcohol and use of illegal drugs is testing, including random testing," Congress mandated a regime of testing for employees in the aviation, railroad, motor carrier, and mass transportation industries. §§ 2(5), 3-6, 105 Stat. 953-965. *See also* 46 U.S.C. § 7702(c)(2) (testing for merchant seamen); 42 U.S.C. § 2473c (testing for safety and security positions in space program).

As it applies in the context of this case, the Testing Act amended the Commercial Motor Vehicle Safety Act of 1986, 49 U.S.C. § 31301, *et seq.*, to require the Secretary of Transportation to establish a program requiring motor carriers to conduct "preemployment, reasonable suspicion, random, and post-accident testing of operators of commercial vehicles for the use of a controlled substance in violation of law or a United States government regulation." *Id.* § 31306(b)(1)(A). The Secretary issued detailed regulations in response to this requirement in 1994. *See* 59 Fed. Reg. 7484 (Feb. 15, 1994).

In issuing the regulations, the Secretary made clear that public policy prohibits not just the performance of safety-

sensitive functions while actually under the influence of illegal drugs, but also performance of those functions by individuals who use drugs. Thus, for example, 49 C.F.R. § 382.213(b) provides that "[n]o employer having actual knowledge that a driver *has used* a controlled substance shall permit the driver to perform or continue to perform a safety-sensitive function," (emphasis added), and 49 C.F.R. § 382.215 imposes the same prohibition where an employer knows that a driver has tested positive (or, as the Union put it below, "simply" tested positive) for drugs. *See also id.* at § 382.501(b). Under these sections, "[a] driver is prohibited from performing, and an employer is prohibited from using a driver to perform, safety-sensitive functions after a positive drug test result * * * *regardless of when the drug * * * was ingested and regardless of whether or not the driver is under the influence of * * * drugs * * *.*" 59 Fed. Reg. at 7495 (emphasis added).

The boundaries of the policy against drug use can also be discerned by comparison with the regulations' treatment of alcohol use. When it comes to alcohol, the regulations take pains to specify that drivers "shall only be tested * * * while the driver is performing safety-sensitive functions, just before the driver is to perform safety-sensitive functions, or just after the driver has ceased performing such functions." 49 C.F.R. § 382.305(m). *See also id.* § 382.311(b). There is no such restriction with respect to controlled substances testing. While there is no policy against employing in the covered positions individuals who use alcohol—so long as they do not do so while on the job or in a way that impairs their performance—there *is* a policy against employing those who use illegal drugs, regardless of the time of use or evidence of impact on performance.[21] The Union, in acknowledging the

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[21] This distinction is further reflected in the references to prevention of the "misuse" of alcohol and the "use" of illegal drugs. *See, e.g.*, 49 C.F.R. § 382.101. *See also* Testing Act § 2(3), 105

public policy against performance of safety-sensitive jobs by those under the influence of illegal drugs, but insisting that public policy is not implicated by use of illegal drugs by those entrusted with such jobs, draws a line expressly rejected in the DOT regulations and the Testing Act itself.

This statutory and regulatory regime is duplicated in the other transportation contexts addressed in the Testing Act,[22] and clearly establishes the existence of a well defined and dominant public policy that—as the Federal Motor Carrier Safety Administration has phrased it—"[i]llicit use of drugs by safety-sensitive drivers is prohibited *on or off duty*."[23] *See also* Testing Act, § 2(3), 105 Stat. 953 (finding of need to eliminate drug use by truck drivers "whether on duty or off duty"). As the *Esso Workers' Union* court observed, "few elements of public policy command the consensus that attaches to the policy against the use of controlled substances by those whose work potentially imperils others." 118 F.3d at 849.

The District Court's rejection of the Union's view that public policy was not implicated when an employee in a safety-sensitive position "merely" tests positive for illegal drugs was well founded. Drug testing is required for those in such positions not for its own sake, but rather to promote the underlying policy against drug use by those in safety-sensitive positions. As the Third Circuit observed in *Exxon III*, "[t]he federal government has manifested its strong

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Stat. 953 (referring to the need to eliminate "abuse of alcohol" and "use of illegal drugs, whether on duty or off duty").

[22] *See* 14 C.F.R. Part 121, Appendix I (airline workers); 49 C.F.R. Part 219 (railroad workers); *id.* Part 653 (mass transportation workers).

[23] FMCSA, Overview of Drug & Alcohol Testing Rules (June 1996) (emphasis added) (visited May 31, 2000) <http://www.fmcsa.dot.gov/safetyprogs/drugs/engtesting.htm>.

support for drug testing of employees involved in mass transportation through the promulgation by all federal agencies governing mass transportation of regulations *designed to prevent drug use by employees in safety-sensitive positions*." 73 F.3d at 1294 (emphasis added). Testing directly serves that policy both by identifying those who use illegal drugs and by acting as a deterrent to drug use by employees in the covered positions. *See* 59 Fed. Reg. at 7494 ("The primary purpose of the testing provisions is to deter misuse of alcohol and controlled substances.").

The Testing Act and the regulations issued pursuant to it thus confirm the pertinent public policy not merely against performance of safety-sensitive jobs by those actually under the influence of drugs, but against the holding of such jobs by those who use drugs. The substantial extent to which the political branches have spelled out the boundaries of this policy demonstrates that it meets the requirements of *Misco* and *W.R. Grace*. Congress and the Executive—not the courts—have already identified the particular safety-sensitive positions to which the policy applies.[24] Congress and the Executive—not the courts—have already determined what substances are covered by the policy. *See* 49 C.F.R. §§ 40.21(a), 382.107. Congress and the Executive—not the courts—have already determined to promote the policy through a mandatory testing regime, and have established testing procedures and identified the detection levels necessary to establish a violation. *See* 49 C.F.R. Part 40; 49 C.F.R. § 382.105. And many other details pertinent to the policy at issue have already been firmly established by the political branches.

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[24] *See* 49 U.S.C. § 45102(a), (b) & 14 C.F.R. Part 121, App. I, Part III (air); 49 U.S.C. § 20140 & 49 C.F.R. § 219.3 (rail); 49 U.S.C. § 31306(b)(1)(A) & 49 C.F.R. § 382.103 (commercial motor vehicle); Testing Act, § 5(b)(7), 105 Stat. 962 & 49 C.F.R. § 653.7 (mass transit).

Thus, petitioner is not asking that the courts be empowered to engage in a wide-ranging examination of what is good public policy, unguided by the judgments of the political branches, and to establish detailed boundaries for that policy. Rather, it is asking that the courts be permitted to acknowledge the substantial policy development already undertaken by those branches and not lend their aid to the enforcement of contracts that undermine those policies. As we explain next, enforcement of the award reinstating Smith would do just that.

C. Enforcement Of The Arbitrator's Award Reinstating Smith Would Violate Public Policy.

1. There is no doubt that well defined and dominant public policies prohibit a person, such as Smith, from engaging in illegal drug use—whether on or off the job—while employed in a position that Congress has determined to be safety-sensitive and subject to random drug testing. The overarching goal of these policies, of course, is to ensure public safety. The question presented by this case, therefore, is whether the enforcement of the arbitrator's award reinstating Smith is contrary to the well-defined and dominant public policies designed to ensure the safety of the public.

When a contract is objected to on the ground that its enforcement would violate public policies which protect public health or safety, the relevant question for the court is whether enforcement would pose an unreasonable risk that the harm the policies seek to avoid will be realized, thereby making such enforcement contrary to the policies at issue. *See* 14 *Williston on Contracts* § 1644B, at 180 (3d ed. 1972) (public policy forbids "[b]argains which require a performance likely to jeopardize unreasonably the life or health of either or both parties, or of a third person"); *Hanford* v. *Connecticut Fair Ass'n*, 103 A. 838, 839 (Conn. 1918) (contract to hold a baby show void on public policy grounds if, due to an epidemic, holding the show "would be highly dangerous to the health of the community"). In this particular context, therefore, the

issue is whether an arbitration award reinstating a drug user to a safety-sensitive transportation position would pose an unreasonable risk to public safety contrary to the well defined and dominant policies identified by the political branches. *See Union Pacific*, 3 F.3d at 262 ("What violates public policy in this case is the Board's decision to reinstate to his former position a railroad employee who poses a significant risk to the public because of his potential for future use on the job."); *Amalgamated Meat Cutters* v. *Great Western Food Co.*, 712 F.2d 122, 125 n.1 (5th Cir. 1983) ("enforcement of the arbitral award would have created a serious potential danger to the health or lives of third persons—* * * in this case, other highway travellers"). Where the risk is too great that the employee's reinstatement would inflict significant injury on the traveling public contrary to well defined and dominant policies, the reinstatement violates those policies.[25]

In determining whether reinstatement would constitute an unreasonable risk of harm, courts have considered several factors. The first is the magnitude of the potential harm to life, health, and property that could result if the employee were to engage in the dangerous conduct prohibited by public policy (here, driving massive trucks under the influence of drugs). *See Exxon I*, 993 F.2d at 367 ("In concluding the award violated public policy, we emphasize * * * the poten-

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[25] This determination can only be made based on the particular facts and circumstances of the case at hand. *See Town of Newton*, 480 U.S. at 392, 397 (considering enforceability "in the circumstances" and with respect to the particular release-dismissal "agreement presented by this case"); *id.* at 399, 402 (O'Connor, J., concurring) (agreeing with the Court's "case-by-case approach" and its decision "on the facts of this particular case" and engaging in a "[c]lose examination of all the factors in this case"); *Southwestern Sugar & Molasses Co.* v. *River Terminals Corp.*, 360 U.S. 411, 421 (1959); Restatement § 178(1) (applicability of public policy doctrine determined "in the circumstances").

tially disastrous effects of a major oil spill on the environment.").

The second factor is the probability that the employee would, in fact, engage in the dangerous conduct if reinstated. *See DuPont*, 790 F.2d at 615 (reinstatement of employee who went on destructive rampage not against public policy since "the likelihood of a future mental breakdown * * * is remote"). *See also W.R. Grace*, 461 U.S. at 769 (analyzing whether enforcement of arbitration award would create "intolerable incentives" to violate public policy against disobeying court orders).[26] In this regard, the presence or absence of findings by the arbitrator on whether the employee has been (or could be) successfully rehabilitated is relevant; courts are free to conclude from the absence of suitable findings giving assurance that the employee will not be dangerous in the future that the arbitration award does not adequately protect public safety. *See Union Pacific*, 3 F.3d at 262 ("the Board's reinstatement of Madison without determining the likelihood of his working on the railroad in the future under the influence of alcohol or drugs violates the public policy"); *Exxon I*, 993 F.2d at 364 n.7 (public policy violated "[w]here, as here, the arbitration panel found that Foster had used marijuana, but required Exxon to reinstate [him] * * * without also finding that he had been 'cured' or rehabilitated"). Even more probative than such predictive

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[26] Thus, the analysis is not confined to whether it is certain that an injury-causing accident would occur. This Court has made clear that a contract is void when it has a "baneful tendency" to violate public policy. *Crocker* v. *United States*, 240 U.S. 74, 79 (1916) (contingent fee agreements for securing government contracts invalid because of risk of corruption). *Accord Ritter*, 169 U.S. at 154; *Tool Co.* v. *Norris*, 69 U.S. 45, 55 (1864). *See also Burt* v. *Union Cent. Life Ins. Co.*, 187 U.S. 362, 369 (1902) (refusing to enforce life insurance policy on person executed for capital murder to avoid giving beneficiaries "an inducement" to withhold exculpatory evidence at insured's trial).

judgments, of course, is concrete evidence of the success or failure of past rehabilitation efforts involving the individual at issue. *See Gulf Coast*, 991 F.2d at 255 (public policy violated by arbitral reinstatement of employee "who had already taken advantage of his company's rehabilitation-focused treatment program" before failing drug test).

The third factor to be considered is the extent, if any, to which reinstatement would encourage other workers to engage in the prohibited conduct or undermine employer efforts to deter such conduct. *See United States Postal Serv.* v. *National Ass'n of Letter Carriers*, 481 U.S. 1301, 1303 (1987) (Rehnquist, C.J., in chambers) (reinstatement of letter carrier found with 3,500 pieces of undelivered mail in his car "will seriously impair the [Postal Service's] ability to impress the seriousness of the Postal Service's mission upon its workers"); *Exxon II*, 11 F.3d at 1193 n.7 (examining "condonation" effect; "the arbitration award requiring Fris's reinstatement sent an undesirable signal to other employees that alcohol abuse in a safety-sensitive job and industry would not be severely punished") (quotation marks and brackets omitted); *Postal Service*, 736 F.2d at 825 (considering effect "rehiring of Cote would have on other postal employees * * * [who] may feel there is less reason for them to be honest than they believed—the Union could always fix it if they were caught"). *See also Weil* v. *Neary*, 278 U.S. 160, 173 (1929) ("What is struck at in the refusal to enforce contracts of this kind is not only actual evil results but their tendency to evil in other cases.").

2. In this case, there is no question that returning Smith to his job would pose an unreasonable risk of harm to the public. As to the first factor described above—the magnitude of potential harm—it requires no great exercise of imagination to foresee the tragedy that could occur were Smith to

navigate his mammoth truck on the roads of West Virginia under the influence of marijuana.[27]

As to the second factor—the probability of harm—the facts as found by the arbitrator suggest that Smith is likely to use drugs again. Smith did not "merely" fail a drug test; he is a repeat offender. His latest dismissal occurred after he failed a drug test, was terminated and then "rescued" by an arbitrator's reinstatement award, Pet. App. 27a, went through the company's rehabilitation program, was put on notice that he would face random drug tests in the future, and then failed a subsequent drug test—within 14 months of his reinstatement after his first failure. In short, Smith—perhaps encouraged not to take the drug policy seriously by his first reinstatement—was neither rehabilitated nor deterred by his first positive drug test, termination, and substance abuse treatment. There is no reason to be confident the process will succeed after his second reinstatement. *See Gulf Coast*, 991 F.2d at 255; Brief Amicus Curiae of the Institute for a Drug-Free Workplace 16-18.

It is important to note that the arbitrator made no finding that Smith was unlikely to use drugs in the future. While the arbitrator did find "creditable" Smith's explanation—that a "personal/family problem" caused him to resort to marijuana use, Pet. App. 28a—that conclusion says nothing about whether Smith was likely to use drugs in the future—whether for a "good" reason or for no reason at all. Indeed, in urging that Smith "handle both the personal/family problems along with the drug use problem" in future counseling, the arbitrator indicated that the asserted cause of the drug use was

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[27] Large trucks—defined as those weighing more than 10,000 pounds—accounted for only 3 percent of registered vehicles but 13 percent of all traffic fatalities in 1998. Of those fatalities, 86 percent were occupants of another vehicle or nonoccupants. National Highway Traffic Safety Administration, *Traffic Safety Facts 1998—Large Trucks* 1-2 (DOT HS 808 952).

ongoing. *Id.* 29a. The arbitrator also did not rule out the possibility that Smith could be pulling the wool over his eyes. *Id.* 28a.[28]

The third factor—the effect of reinstatement on others—also cuts strongly against enforcing the award. EACC has numerous workers in safety-sensitive positions. If other EACC employees see Smith hold on to his job after failing not one, but two drug tests, the deterrent force of the testing program will be dissipated. And in a future arbitration it will be difficult for EACC to argue—and unlikely that an arbitrator would accept—that another similarly situated employee who has failed one, or even two, drug tests should be discharged when Smith was given a *third* chance.

In these circumstances, reinstating Smith would make a mockery of the drug testing regime mandated by Congress and the DOT regulations and implemented by EACC. As the First Circuit has observed, "[i]t makes no sense to construe public policy as encouraging—and in some cases mandating—employers to establish and enforce drug-testing programs, yet to preclude them from taking decisive action against those employees who test positive." *Esso Workers' Union*, 118 F.3d at 850. On the contrary, "it would insult public policy for a court to enforce a contract that requires the ongoing employment in a safety-sensitive capacity of a worker who has scorned the employer's drug-free workplace program." *Id.* at 851.

In sum, Smith's reinstatement to a highly dangerous occupation—on a record that gives no assurance that he will not

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[28] While the arbitrator somehow took comfort in his supposition that Smith would be caught if he once again engaged in illegal drug use, Pet. App. 28a, it is plainly unreasonable to require the public to shoulder the risk that Smith's third strike might be discovered by sifting through the rubble of an accident involving his 55,000 pound truck.

use drugs in the future—poses an unreasonable risk of harm to the traveling public and, accordingly, violates well defined and dominant public policy. A contract with a tendency "to endanger the public interests or injuriously affect the public good, * * * ought never to receive the sanction of a court of justice." *Ritter*, 169 U.S. at 154.

D. The Contrary Arguments Are Unavailing.

Arguments that similar reinstatement awards should not be enforced have generally been met with two responses by those lower courts that have refused to upset orders returning drug users to safety-sensitive positions. First, some courts have suggested that the employer is bound by the fact that the contract leaves open the possibility of reinstatement rather than establishing a *per se* termination rule for employees who use controlled substances. Second, courts have declined to upset reinstatement on the theory that the pertinent regulations permit some lesser sanction and do not require termination but in fact contemplate reinstatement. *See, e.g., IBEW, Local 97* v. *Niagara Mohawk Power Corp.*, 143 F.3d 704, 727 (2d Cir. 1998) (declining to upset reinstatement because company "acquiesced" in an agreement "that did not provide it with sufficient authority" and because regulator "has chosen not to confront this issue directly"). Neither objection is well taken.

As for the former, contract-based objection, it is entirely non-responsive to the very doctrine being considered. In *every* case where a contract is not enforced because it is contrary to public policy, the parties have necessarily agreed to a result different from the one mandated by public policy.[29] For the reasons explained at 12-14, *supra*, courts

[29] Here, of course, EACC expressly provided through its Drug and Alcohol Policy that a driver testing positive for drugs "will be removed from any safety sensitive position and subject to disciplinary action *up to and including termination*." Pet. App. 9a n.4 (emphasis added).

nevertheless retain the authority—indeed, the obligation—not to enforce contracts that would violate public policy. *See W.R. Grace*, 461 U.S. at 766 ("As with any contract * * * a court may not enforce a collective bargaining agreement that is contrary to public policy."); *Pullman Southern*, 139 U.S. at 89 ("the law will not permit individuals to oblige themselves by contract, when the thing to be done or omitted is injurious to the public"). It is no answer to say that the parties could have avoided the conflict with well defined and dominant policy by entering into a different contractual arrangement; the question is whether a court —cognizant of the interests of the public, who are not parties to the contract—will enforce a private arrangement that is contrary to public policy.

The second objection—limiting the court's discretion to what the regulations require—is simply a reprise of the "positive law" issue left unresolved in *Misco*, as the District Court's opinion below demonstrates. If, as the discussion in Part I makes clear, there is a longstanding and necessary role for the courts to discern and protect public policy without being limited to those offenses against public policy specifically anticipated in legislation and regulation, then it would make no sense to reject a public policy argument on the ground that legislation or regulations do not dictate the result compelled by public policy.[30]

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[30] In the past, arbitrators have entered awards reinstating (1) a drunk airline pilot who flew a Boeing 727 filled with passengers while having a blood alcohol level of .13, *see Delta Air Lines*, *supra*; (2) the helmsman of an 635-foot oil tanker who tested positive for marijuana after his ship ran aground, *see Exxon I*, *supra*; (3) an intoxicated truck driver who overturned an eighteen-wheel tractor-trailer rig, *see Amalgamated Meat Cutters*, *supra*; and (4) a nuclear power plant employee who deliberately violated federal safety regulations to leave early for lunch, *see Iowa Electric*, *supra*. The adoption of respondents' position would

This is especially true here. In the first place, the regulations the courts below found dispositive do not expressly address the issue of a repeat offender such as Smith. It is far from clear that in allowing reinstatement of a driver who completes a program of referral, evaluation, and treatment, and passes a return-to-duty test, 49 C.F.R. §§ 382.309, 382.503, 382.605, the regulations were also intended to allow a *second* reinstatement of drivers who have been through that drill before and nevertheless test positive again. That question is simply not addressed by the regulations.

Second, in issuing the regulations, the Secretary made clear that—even with respect to first-time offenders—the regulations do not exhaust the possible consequences for an employee who tests positive for illegal drugs. The regulatory regime expressly contemplates the prospect of additional consequences imposed pursuant to authority beyond the regulations. *See id.* §§ 382.111, 382.601(c) (permitting "additional employer policies with respect to the use of alcohol or controlled substances, including any consequences for a driver found to have a specified alcohol or controlled substances level"). Indeed, in issuing the regulations, the Secretary stated that "[c]ompliance with the prescribed treatment and passing the [follow up drug] test(s) will not guarantee a right of reemployment." 59 Fed. Reg. at 7503. And regulatory guidance issued by the Federal Motor Carrier Safety Administration reiterates that the employer retains the authority to discharge an employee who tests positive for drugs.[31]

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leave federal courts no choice but to become complicit in the threat to public safety entailed by such awards.

[31] *See* FMCSA, Regulatory Guidance on Part 382—Controlled Substances and Alcohol Use and Testing, Guidance on 49 C.F.R. § 382.605 (visited May 31, 2000) <http://www.fmcsa.dot.gov/rulesregs/fmcsr/regs/382reg.htm>.

All this makes clear that the regulations adopted pursuant to the Testing Act do not "entirely occup[y] the field" with respect to the public policy at issue. Restatement § 179, comment b. While the Act and its regulations could have prescribed a uniform sanction for every failed test, or attempted to address every varied situation that might arise—including that of a recidivist—such an effort to devise a comprehensive code would not necessarily have served the public policy. No fixed regulatory scheme could be expected to anticipate the variety of factual circumstances that might arise or dictate the appropriate sanction that might apply to each scenario. Instead, the regulations set out certain guidelines and requirements, and leave other details unresolved. While employers and employees therefore remain free to agree by contract on both the process for addressing violations of the drug policy and on sanctions for those violations, any such agreement—like all other contractual arrangements—remains subject to the public policy doctrine, applied by the courts. Nothing in the Act or regulations suggests otherwise.

A court that declines to enforce an award returning a two-time drug abuser to his safety-sensitive position is not engaged in some free-wheeling and unbridled exercise of policy formation. Instead, the court is guided by the broad national consensus that those who use illegal drugs should not be entrusted with safety-sensitive tasks, and the judgment that returning a two-time offender to such tasks would make a mockery of policies adopted by the Executive and the Legislature. The public policy doctrine allows the courts to avoid complicity in that mockery, and the very real threat to public safety it entails.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

RONALD E. MEISBURG
HEENAN, ALTHEN & ROLES
1110 Vermont Avenue, N.W.
Suite 400
Washington, D.C. 20005
(202) 887-0800

ANNA M. DAILEY
DONNA C. KELLY
HENNAN, ALTHEN & ROLES
1380 One Valley Square
P.O. Box 2549
Charleston, WV 25329
(304) 342-8960

JOHN G. ROBERTS, JR.*
DAVID G. LEITCH
H. CHRISTOPHER BARTOLOMUCCI
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

* Counsel of Record

Counsel for Petitioner

Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a):

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Selected Portions of the Omnibus Transportation Employee Testing Act of 1991, Pub. L. No. 102-143, Title V, 105 Stat. 917, 952-965:

[952] **Findings**

Sec. 2. The Congress finds that—

(1) alcohol abuse and illegal drug use pose significant dangers to the safety and welfare of the Nation; [953]

(2) millions of the Nation's citizens utilize transportation by aircraft, railroads, trucks, and buses, and depend on the operators of aircraft, trains, trucks, and buses to perform in a safe and responsible manner;

(3) the greatest efforts must be expended to eliminate the abuse of alcohol and use of illegal drugs, whether on duty or off duty, by those individuals who are involved in the operation of aircraft, trains, trucks, and buses;

(4) the use of alcohol and illegal drugs has been demonstrated to affect significantly the performance of individuals, and has been proven to have been a critical factor in transportation accidents;

(5) the testing of uniformed personnel of the Armed Forces has shown that the most effective deterrent to abuse of

alcohol and use of illegal drugs is increased testing, including random testing;

(6) adequate safeguards can be implemented to ensure that testing for abuse of alcohol or use of illegal drugs is performed in a manner which protects an individual's right of privacy, ensures that no individual is harassed by being treated differently from other individuals, and ensures that no individual's reputation or career development is unduly threatened or harmed; and

(7) rehabilitation is a critical component of any testing program for abuse of alcohol or use of illegal drugs, and should be made available to individuals, as appropriate.

* * *

[959] **Testing To Enhance Motor Carrier Safety**

Sec. 5. (a)(1) The Commercial Motor Vehicle Safety Act of 1986 (49 App. U.S.C. 2701 et seq. [now 49 U.S.C. 31301 et seq.]) is amended by adding at the end the following new section:

"Sec. 12020. Alcohol And Controlled Substances Testing.

"(a) Regulations.—The Secretary shall, in the interest of commercial motor vehicle safety, issue regulations within twelve months after the date of enactment of this section. Such regulations shall establish a program which requires motor carriers to conduct preemployment, reasonable suspicion, random, and post-accident testing of the operators of commercial motor vehicles for use, in violation of law or Federal regulation, of alcohol or a controlled substance. The Secretary may also issue regulations, as the Secretary considers appropriate in the interest of safety, for the conduct of periodic recurring testing of such operators for such use in violation of law or Federal regulation.

"(b) Testing.—

"(1) Post-accident testing.—In issuing such regulations, the Secretary shall require that post-accident testing of the operator of a commercial motor vehicle be conducted in the case of any accident involving a commercial motor vehicle in which occurs loss of human life, or, as determined by the Secretary, other serious accidents involving bodily injury or significant property damage.

"(2) Testing as part of medical examination.—Nothing in subsection (a) of this section shall preclude the Secretary from providing in such regulations that such testing be conducted as part of the medical examination required by subpart E of part 391 of title 49, Code of Federal Regulations, with respect to those operators of commercial motor vehicles to whom such part is applicable.

"(c) Program for Rehabilitation.—The Secretary shall issue regulations setting forth requirements for rehabilitation programs which provide for the identification and opportunity for treatment of operators of commercial motor vehicles who are determined to have used, in violation of law or Federal regulation, alcohol or a controlled substance. The Secretary shall determine the circumstances under which such operators shall be required to participate in such program. Nothing in this subsection shall preclude a motor carrier from establishing a program under this subsection in cooperation with any other motor carrier.

"(d) Procedures for testing.—In establishing the program required under subsection (a) of this section, the Secretary shall develop requirements which shall—

"(1) promote, to the maximum extent practicable, individual privacy in the collection of specimen samples;

"(2) with respect to laboratories and testing procedures for controlled substances, incorporate the Department of Health

and Human Services scientific and technical guidelines dated April 11, 1988, and any subsequent amendments thereto, including mandatory guidelines which—[960]

"(A) establish comprehensive standards for all aspects of laboratory controlled substances testing and laboratory procedures to be applied in carrying out this section, including standards which require the use of the best available technology for ensuring the full reliability and accuracy of controlled substances tests and strict procedures governing the chain of custody of specimen samples collected for controlled substances testing;

"(B) establish the minimum list of controlled substances for which individuals may be tested; and

"(C) establish appropriate standards and procedures for periodic review of laboratories and criteria for certification and revocation of certification of laboratories to perform controlled substances testing in carrying out this section;

"(3) require that all laboratories involved in the testing of any individual under this section shall have the capability and facility, at such laboratory, of performing screening and confirmation tests;

"(4) provide that all tests which indicate the use, in violation of law or Federal regulation, of alcohol or a controlled substance by any individual shall be confirmed by a scientifically recognized method of testing capable of providing quantitative data regarding alcohol or a controlled substance;

"(5) provide that each specimen sample be subdivided, secured, and labelled in the presence of the tested individual and that a portion thereof be retained in a secure manner to prevent the possibility of tampering, so that in the event the individual's confirmation test results are positive the individual has an opportunity to have the retained portion assayed by a confirmation test done independently at a second certified laboratory if the individual requests the independent

test within 3 days after being advised of the results of the confirmation test;

"(6) ensure appropriate safeguards for testing to detect and quantify alcohol in breath and body fluid samples, including urine and blood, through the development of regulations as may be necessary and in consultation with the Department of Health and Human Services;

"(7) provide for the confidentiality of test results and medical information (other than information relating to alcohol or a controlled substance) of employees, except that the provisions of this paragraph shall not preclude the use of test results for the orderly imposition of appropriate sanctions under this section; and

"(8) ensure that employees are selected for tests by nondiscriminatory and impartial methods, so that no employee is harassed by being treated differently from other employees in similar circumstances.

"(e) Effect on Other Laws and Regulations.—

"(1) State and local law and regulations.—No State or local government shall adopt or have in effect any law, rule, regulation, ordinance, standard, or order that is inconsistent with the regulations issued under this section, except that the regulations issued under this section shall not be construed to preempt provisions of State criminal law which impose sanctions for reckless conduct leading to actual loss of life, injury, or damage to property, whether the provisions apply specifically to commercial motor vehicle employees, or to the general public. [961]

"(2) Other regulations issued by secretary.—Nothing in this section shall be construed to restrict the discretion of the Secretary to continue in force, amend, or further supplement any regulations governing the use of alcohol or controlled

substances by commercial motor vehicle employees issued before the date of enactment of this section.

"(3) International obligations.—In issuing regulations under this section, the Secretary shall only establish requirements that are consistent with the international obligations of the United States, and the Secretary shall take into consideration any applicable laws and regulations of foreign countries.

"(f) Application of Penalties.—

"(1) Effect on other penalties.—Nothing in this section shall be construed to supersede any penalty applicable to the operator of a commercial motor vehicle under this title or any other provision of law.

"(2) Determination of sanctions.—The Secretary shall determine appropriate sanctions for commercial motor vehicle operators who are determined, as a result of tests conducted and confirmed under this section, to have used, in violation of law or Federal regulation, alcohol or a controlled substance but are not under the influence of alcohol or a controlled substance, as provided in this title.

"(g) Definition.—For the purposes of this section, the term 'controlled substance' means any substance under section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)) specified by the Secretary.".

(2) The table of contents of the Commercial Motor Vehicle Safety Act of 1986 (Public Law 99-570; 100 Stat. 5223) is amended by adding at the end thereof the following:

"Sec. 12020. Alcohol and controlled substances testing."

(b)(1) The Secretary of Transportation shall design within nine months after the date of enactment of this Act, and implement within fifteen months after the date of enactment of this Act, a pilot test program for the purpose of testing the

operators of commercial motor vehicles on a random basis to determine whether an operator has used, in violation of law or Federal regulation, alcohol or a controlled substance. The pilot test program shall be administered as part of the Motor Carrier Safety Assistance Program.

(2) The Secretary shall solicit the participation of States which are interested in participating in such program and shall select four States to participate in the program.

(3) The Secretary shall ensure that the States selected pursuant to this subsection are representative of varying geographical and population characteristics of the Nation and that the selection takes into consideration the historical geographical incidence of commercial motor vehicle accidents involving loss of human life.

(4) The pilot program authorized by this subsection shall continue for a period of one year. The Secretary shall consider alternative methodologies for implementing a system of random testing of operators of commercial motor vehicles.

(5) Not later than thirty months after the date of enactment of this Act, the Secretary shall prepare and submit to the Congress a comprehensive report setting forth the results of the pilot program conducted under this subsection. Such report shall include any recommendations of the Secretary concerning the desirability and [962] implementation of a system for the random testing of operators of commercial motor vehicles.

(6) For purposes of carrying out this subsection, there shall be available to the Secretary $5,000,000 from funds made available to carry out section 404 of the Surface Transportation Assistance Act of 1982 (49 App. U.S.C. 2304) for fiscal year 1992.

(7) For purposes of this subsection, the term "commercial motor vehicle" shall have the meaning given to such term in

section 12019(6) of the Commercial Motor Vehicle Safety Act of 1986 (49 App.U.S.C. 2716(6)).

* * *

Selected Portions of Title 49 of the Code of Federal Regulations, Part 382:

PART 382—CONTROLLED SUBSTANCES AND ALCOHOL USE AND TESTING

Subpart A—General

§ 382.101 Purpose

The purpose of this part is to establish programs designed to help prevent accidents and injuries resulting from the misuse of alcohol or use of controlled substances by drivers of commercial motor vehicles.

§ 382.103 Applicability

(a) This part applies to every person and to all employers of such persons who operate a commercial motor vehicle in commerce in any State, and is subject to:

(1) The commercial driver's license requirements of part 383 of this subchapter;

(2) The Licencia Federal de Conductor (Mexico) requirements; or

(3) The commercial driver's license requirements of the Canadian National Safety Code.

(b) An employer who employs himself/herself as a driver must comply with both the requirements in this part that apply to employers and the requirements in this part that apply to drivers. An employer who employs only himself/herself as a driver shall implement a random alcohol and controlled substances testing program of two or more covered employees in the random testing selection pool.

* * *

§ 382.105 Testing Procedures

Each employer shall ensure that all alcohol or controlled substances testing conducted under this part complies with the procedures set forth in part 40 of this title. The provisions of part 40 of this title that address alcohol or controlled substances testing are made applicable to employers by this part.

§ 382.107 Definitions

Words or phrases used in this part are defined in §§ 386.2 and 390.5 of this subchapter, and § 40.3 of this title, except as provided herein—

Alcohol means the intoxicating agent in beverage alcohol, ethyl alcohol, or other low molecular weight alcohols including methyl and isopropyl alcohol.

Alcohol concentration (or content) means the alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by an evidential breath test under this part.

Alcohol use means the consumption of any beverage, mixture, or preparation, including any medication, containing alcohol.

Commerce means:

(1) Any trade, traffic or transportation within the jurisdiction of the United States between a place in a State and a place outside of such State, including a place outside of the United States and

(2) Trade, traffic, and transportation in the United States which affects any trade, traffic, and transportation described in paragraph (1) of this definition.

Commercial motor vehicle means a motor vehicle or combination of motor vehicles used in commerce to transport passengers or property if the motor vehicle—

(1) Has a gross combination weight rating of 11,794 or more kilograms (26,001 or more pounds) inclusive of a towed unit with a gross vehicle weight rating of more than 4,536 kilograms (10,000 pounds); or

(2) Has a gross vehicle weight rating of 11,794 or more kilograms (26,001 or more pounds); or

(3) Is designed to transport 16 or more passengers, including the driver; or

(4) Is of any size and is used in the transportation of materials found to be hazardous for the purposes of the Hazardous Materials Transportation Act and which require the motor vehicle to be placarded under the Hazardous Materials Regulations (49 CFR part 172, subpart F).

Confirmation test for alcohol testing means a second test, following a screening test with a result of 0.02 or greater, that provides quantitative data of alcohol concentration. For controlled substances testing means a second analytical procedure to identify the presence of a specific drug or metabolite which is independent of the screen test and which uses a different technique and chemical principle from that of the screen test in order to ensure reliability and accuracy. (Gas chromatography/mass spectrometry (GC/MS) is the only authorized confirmation method for cocaine, marijuana, opiates, amphetamines, and phencyclidine.)

Consortium means an entity, including a group or association of employers or contractors, that provides alcohol or controlled substances testing as required by this part, or other DOT alcohol or controlled substances testing rules, and that acts on behalf of the employers.

Controlled substances mean those substances identified in § 40.21(a) of this title.

Disabling damage means damage which precludes departure of a motor vehicle from the scene of the accident in its usual manner in daylight after simple repairs.

(1) *Inclusions.* Damage to motor vehicles that could have been driven, but would have been further damaged if so driven.

(2) *Exclusions.*

(i) Damage which can be remedied temporarily at the scene of the accident without special tools or parts.

(ii) Tire disablement without other damage even if no spare tire is available.

(iii) Headlight or taillight damage.

(iv) Damage to turn signals, horn, or windshield wipers which make them inoperative.

DOT Agency means an agency (or "operating administration") of the United States Department of Transportation administering regulations requiring alcohol and/or drug testing (14 CFR parts 61, 63, 65, 121, and 135; 49 CFR parts 199, 219, 382, 653 and 654), in accordance with part 40 of this title.

Driver means any person who operates a commercial motor vehicle. This includes, but is not limited to: Full time, regularly employed drivers; casual, intermittent or occasional drivers; leased drivers and independent, owner-operator contractors who are either directly employed by or under lease to an employer or who operate a commercial motor vehicle at the direction of or with the consent of an employer.

Employer means any person (including the United States, a State, District of Columbia, tribal government, or a political

subdivision of a State) who owns or leases a commercial motor vehicle or assigns persons to operate such a vehicle. The term *employer* includes an employer's agents, officers and representatives.

Licensed medical practitioner means a person who is licensed, certified, and/or registered, in accordance with applicable Federal, State, local, or foreign laws and regulations, to prescribe controlled substances and other drugs.

Performing (a safety-sensitive function) means a driver is considered to be performing a safety-sensitive function during any period in which he or she is actually performing, ready to perform, or immediately available to perform any safety-sensitive functions.

Positive rate means the number of positive results for random controlled substances tests conducted under this part plus the number of refusals of random controlled substances tests required by this part, divided by the total of random controlled substances tests conducted under this part plus the number of refusals of random tests required by this part.

Refuse to submit (to an alcohol or controlled substances test) means that a driver:

(1) Fails to provide adequate breath for alcohol testing as required by part 40 of this title, without a valid medical explanation, after he or she has received notice of the requirement for breath testing in accordance with the provisions of this part,

(2) Fails to provide an adequate urine sample for controlled substances testing as required by part 40 of this title, without a genuine inability to provide a specimen (as determined by a medical evaluation), after he or she has received notice of the requirement for urine testing in accordance with the provisions of this part, or

(3) Engages in conduct that clearly obstructs the testing process.

Safety-sensitive function means all time from the time a driver begins to work or is required to be in readiness to work until the time he/she is relieved from work and all responsibility for performing work. Safety-sensitive functions shall include:

(1) All time at an employer or shipper plant, terminal, facility, or other property, or on any public property, waiting to be dispatched, unless the driver has been relieved from duty by the employer;

(2) All time inspecting equipment as required by §§ 392.7 and 392.8 of this subchapter or otherwise inspecting, servicing, or conditioning any commercial motor vehicle at any time;

(3) All time spent at the driving controls of a commercial motor vehicle in operation;

(4) All time, other than driving time, in or upon any commercial motor vehicle except time spent resting in a sleeper berth (a berth conforming to the requirements of § 393.76 of this subchapter);

(5) All time loading or unloading a vehicle, supervising, or assisting in the loading or unloading, attending a vehicle being loaded or unloaded, remaining in readiness to operate the vehicle, or in giving or receiving receipts for shipments loaded or unloaded; and

(6) All time repairing, obtaining assistance, or remaining in attendance upon a disabled vehicle.

Screening test (also known as initial test) In alcohol testing, it means an analytical procedure to determine whether a driver may have a prohibited concentration of alcohol in his or her system. In controlled substance testing, it means an

immunoassay screen to eliminate "negative" urine specimens from further consideration.

Violation rate means the number of drivers (as reported under § 382.305 of this part) found during random tests given under this part to have an alcohol concentration of 0.04 or greater, plus the number of drivers who refuse a random test required by this part, divided by the total reported number of drivers in the industry given random alcohol tests under this part plus the total reported number of drivers in the industry who refuse a random test required by this part.

§ 382.109 Preemption of State and local laws

(a) Except as provided in paragraph (b) of this section, this part preempts any State or local law, rule, regulation, or order to the extent that:

(1) Compliance with both the State or local requirement and this part is not possible; or

(2) Compliance with the State or local requirement is an obstacle to the accomplishment and execution of any requirement in this part.

(b) This part shall not be construed to preempt provisions of State criminal law that impose sanctions for reckless conduct leading to actual loss of life, injury, or damage to property, whether the provisions apply specifically to transportation employees, employers, or the general public.

§ 382.111 Other requirements imposed by employers

Except as expressly provided in this part, nothing in this part shall be construed to affect the authority of employers, or the rights of drivers, with respect to the use of alcohol, or the use of controlled substances, including authority and rights with respect to testing and rehabilitation.

§ 382.113 Requirements for notice

Before performing an alcohol or controlled substances test under this part, each employer shall notify a driver that the alcohol or controlled substances test is required by this part. No employer shall falsely represent that a test is administered under this part.

* * *

Subpart B—Prohibitions

§ 382.201 Alcohol concentration

No driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions while having an alcohol concentration of 0.04 or greater. No employer having actual knowledge that a driver has an alcohol concentration of 0.04 or greater shall permit the driver to perform or continue to perform safety-sensitive functions.

§ 382.205 On-duty use

No driver shall use alcohol while performing safety-sensitive functions. No employer having actual knowledge that a driver is using alcohol while performing safety-sensitive functions shall permit the driver to perform or continue to perform safety-sensitive functions.

§ 382.207 Pre-duty use

No driver shall perform safety-sensitive functions within four hours after using alcohol. No employer having actual knowledge that a driver has used alcohol within four hours shall permit a driver to perform or continue to perform safety-sensitive functions.

§ 382.209 Use following an accident

No driver required to take a post-accident alcohol test under § 382.303 of this part shall use alcohol for eight hours

following the accident, or until he/she undergoes a post-accident alcohol test, whichever occurs first.

§ 382.211 Refusal to submit to a required alcohol or controlled substances test

No driver shall refuse to submit to a post-accident alcohol or controlled substances test required under § 382.303, a random alcohol or controlled substances test required under § 382.305, a reasonable suspicion alcohol or controlled substances test required under § 382.307, or a follow-up alcohol or controlled substances test required under § 382.311. No employer shall permit a driver who refuses to submit to such tests to perform or continue to perform safety-sensitive functions.

§ 382.213 Controlled substances use

(a) No driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions when the driver uses any controlled substance, except when the use is pursuant to the instructions of a licensed medical practitioner, as defined in § 382.107 of this part, who has advised the driver that the substance will not adversely affect the driver's ability to safely operate a commercial motor vehicle.

(b) No employer having actual knowledge that a driver has used a controlled substance shall permit the driver to perform or continue to perform a safety-sensitive function.

(c) An employer may require a driver to inform the employer of any therapeutic drug use.

§ 382.215 Controlled substances testing

No driver shall report for duty, remain on duty or perform a safety-sensitive function, if the driver tests positive for controlled substances. No employer having actual knowledge that a driver has tested positive for controlled sub-

stances shall permit the driver to perform or continue to perform safety-sensitive functions.

Subpart C—Tests Required

§ 382.301 Pre-employment testing

(a) Prior to the first time a driver performs safety-sensitive functions for an employer, the driver shall undergo testing for alcohol and controlled substances as a condition prior to being used, unless the employer uses the exception in paragraphs (c) and (d) of this section. No employer shall allow a driver, who the employer intends to hire or use, to perform safety-sensitive functions unless the driver has been administered an alcohol test with a result indicating an alcohol concentration less than 0.04, and has received a controlled substances test result from the MRO indicating a verified negative test result. If a pre-employment alcohol test result under this section indicates an alcohol content of 0.02 or greater but less than 0.04, the provision of § 382.505 shall apply.

(b) *Exception for pre-employment alcohol testing.* An employer is not required to administer an alcohol test required by paragraph (a) of this section if:

(1) The driver has undergone an alcohol test required by this section or the alcohol misuse rule of another DOT agency under part 40 of this title within the previous six months, with a result indicating an alcohol concentration less than 0.04; and

(2) The employer ensures that no prior employer of the driver of whom the employer has knowledge has records of a violation of this part or the alcohol misuse rule of another DOT agency within the previous six months.

(c) *Exception for pre-employment controlled substances testing.* An employer is not required to administer a con-

trolled substances test required by paragraph (a) of this section if:

(1) The driver has participated in a controlled substances testing program that meets the requirements of this part within the previous 30 days; and

(2) While participating in that program, either

(i) Was tested for controlled substances within the past 6 months (from the date of application with the employer) or

(ii) Participated in the random controlled substances testing program for the previous 12 months (from the date of application with the employer); and

(3) The employer ensures that no prior employer of the driver of whom the employer has knowledge has records of a violation of this part or the controlled substances use rule of another DOT agency within the previous six months.

(d)(1) An employer who exercises the exception in either paragraph (b) or (c) of this section shall contact the alcohol and/or controlled substances testing program(s) in which the driver participates or participated and shall obtain and retain from the testing program(s) the following information:

(i) Name(s) and address(es) of the program(s).

(ii) Verification that the driver participates or participated in the program(s).

(iii) Verification that the program(s) conforms to part 40 of this title.

(iv) Verification that the driver is qualified under the rules of this part, including that the driver has not refused to be tested for controlled substances.

(v) The date the driver was last tested for alcohol or controlled substances.

(vi) The results of any tests taken within the previous six months and any other violations of subpart B of this part.

(2) An employer who uses, but does not employ, a driver more than once a year to operate commercial motor vehicles must obtain the information in paragraph (d)(1) of this section at least once every six months. The records prepared under this paragraph shall be maintained in accordance with § 382.401. If the employer cannot verify that the driver is participating in a controlled substances testing program in accordance with this part and part 40, the employer shall conduct a pre-employment alcohol and/or controlled substances test.

(e) Notwithstanding any other provisions of this subpart, all provisions and requirements in this section pertaining to pre-employment testing for alcohol are vacated as of May 1, 1995.

§ 382.303 Post-accident testing

(a) As soon as practicable following an occurrence involving a commercial motor vehicle operating on a public road in commerce, each employer shall test for alcohol and controlled substances each surviving driver:

(1) Who was performing safety-sensitive functions with respect to the vehicle, if the accident involved the loss of human life; or

(2) Who receives a citation under State or local law for a moving traffic violation arising from the accident, if the accident involved:

(i) Bodily injury to any person who, as a result of the injury, immediately receives medical treatment away from the scene of the accident; or

(ii) One or more motor vehicles incurring disabling damage as a result of the accident, requiring the motor vehicle to be

transported away from the scene by a tow truck or other motor vehicle.

* * *

(b)(1) *Alcohol tests*. If a test required by this section is not administered within two hours following the accident, the employer shall prepare and maintain on file a record stating the reasons the test was not promptly administered. If a test required by this section is not administered within eight hours following the accident, the employer shall cease attempts to administer an alcohol test and shall prepare and maintain the same record. Records shall be submitted to the FHWA upon request of the Associate Administrator.

* * *

(4) Controlled substance tests. If a test required by this section is not administered within 32 hours following the accident, the employer shall cease attempts to administer a controlled substances test, and prepare and maintain on file a record stating the reasons the test was not promptly administered. Records shall be submitted to the FHWA upon request of the Associate Administrator.

(c) A driver who is subject to post-accident testing shall remain readily available for such testing or may be deemed by the employer to have refused to submit to testing. Nothing in this section shall be construed to require the delay of necessary medical attention for injured people following an accident or to prohibit a driver from leaving the scene of an accident for the period necessary to obtain assistance in responding to the accident, or to obtain necessary emergency medical care.

(d) An employer shall provide drivers with necessary post-accident information, procedures and instructions, prior to the driver operating a commercial motor vehicle, so that drivers will be able to comply with the requirements of this section.

(e)(1) The results of a breath or blood test for the use of alcohol, conducted by Federal, State, or local officials having independent authority for the test, shall be considered to meet the requirements of this section, provided such tests conform to the applicable Federal, State or local alcohol testing requirements, and that the results of the tests are obtained by the employer.

(2) The results of a urine test for the use of controlled substances, conducted by Federal, State, or local officials having independent authority for the test, shall be considered to meet the requirements of this section, provided such tests conform to the applicable Federal, State or local controlled substances testing requirements, and that the results of the tests are obtained by the employer.

* * *

§ 382.305 Random testing

(a) Every employer shall comply with the requirements of this section. Every driver shall submit to random alcohol and controlled substance testing as required in this section.

(b)(1) Except as provided in paragraphs (c) through (e) of this section, the minimum annual percentage rate for random alcohol testing shall be 25 percent of the average number of driver positions.

(2) Except as provided in paragraphs (f) through (h) of this section, the minimum annual percentage rate for random controlled substances testing shall be 50 percent of the average number of driver positions.

* * *

(f) The FHWA Administrator's decision to increase or decrease the minimum annual percentage rate for controlled substances testing is based on the reported positive rate for the entire industry. All information used for this determina-

tion is drawn from the controlled substances management information system reports required by § 382.403 of this part. In order to ensure reliability of the data, the FHWA Administrator considers the quality and completeness of the reported data, may obtain additional information or reports from employers, and may make appropriate modifications in calculating the industry positive rate. Each year, the FHWA Administrator will publish in the Federal Register the minimum annual percentage rate for random controlled substances testing of drivers. The new minimum annual percentage rate for random controlled substances testing will be applicable starting January 1 of the calendar year following publication.

(g) When the minimum annual percentage rate for random controlled substances testing is 50 percent, the FHWA Administrator may lower this rate to 25 percent of all driver positions if the FHWA Administrator determines that the data received under the reporting requirements of § 382.403 for two consecutive calendar years indicate that the positive rate is less than 1.0 percent. However, after the initial two years of random testing by large employers and the initial first year of testing by small employers under this section, the FHWA Administrator may lower the rate the following calendar year, if the combined positive testing rate is less than 1.0 percent, and if it would be in the interest of safety.

(h) When the minimum annual percentage rate for random controlled substances testing is 25 percent, and the data received under the reporting requirements of § 382.403 for any calendar year indicate that the reported positive rate is equal to or greater than 1.0 percent, the FHWA Administrator will increase the minimum annual percentage rate for random controlled substances testing to 50 percent of all driver positions.

(i) The selection of drivers for random alcohol and controlled substances testing shall be made by a scientifically

valid method, such as a random number table or a computer-based random number generator that is matched with drivers' Social Security numbers, payroll identification numbers, or other comparable identifying numbers. Under the selection process used, each driver shall have an equal chance of being tested each time selections are made.

(j) The employer shall randomly select a sufficient number of drivers for testing during each calendar year to equal an annual rate not less than the minimum annual percentage rate for random alcohol and controlled substances testing determined by the FHWA Administrator. If the employer conducts random testing for alcohol and/or controlled substances through a consortium, the number of drivers to be tested may be calculated for each individual employer or may be based on the total number of drivers covered by the consortium who are subject to random alcohol and/or controlled substances testing at the same minimum annual percentage rate under this part or any DOT alcohol or controlled substances random testing rule.

(k) Each employer shall ensure that random alcohol and controlled substances tests conducted under this part are unannounced and that the dates for administering random alcohol and controlled substances tests are spread reasonably throughout the calendar year.

(l) Each employer shall require that each driver who is notified of selection for random alcohol and/or controlled substances testing proceeds to the test site immediately; provided, however, that if the driver is performing a safety-sensitive function, other than driving a commercial motor vehicle, at the time of notification, the employer shall instead ensure that the driver ceases to perform the safety-sensitive function and proceeds to the testing site as soon as possible.

(m) A driver shall only be tested for alcohol while the driver is performing safety-sensitive functions, just before the

driver is to perform safety-sensitive functions, or just after the driver has ceased performing such functions.

(n) If a given driver is subject to random alcohol or controlled substances testing under the random alcohol or controlled substances testing rules of more than one DOT agency for the same employer, the driver shall be subject to random alcohol and/or controlled substances testing at the annual percentage rate established for the calendar year by the DOT agency regulating more than 50 percent of the driver's function.

(o) If an employer is required to conduct random alcohol or controlled substances testing under the alcohol or controlled substances testing rules of more than one DOT agency, the employer may—

(1) Establish separate pools for random selection, with each pool containing the DOT-covered employees who are subject to testing at the same required minimum annual percentage rate; or

(2) Randomly select such employees for testing at the highest minimum annual percentage rate established for the calendar year by any DOT agency to which the employer is subject.

§ 382.307 Reasonable suspicion testing

(a) An employer shall require a driver to submit to an alcohol test when the employer has reasonable suspicion to believe that the driver has violated the prohibitions of subpart B of this part concerning alcohol. The employer's determination that reasonable suspicion exists to require the driver to undergo an alcohol test must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the driver.

(b) An employer shall require a driver to submit to a controlled substances test when the employer has reasonable

suspicion to believe that the driver has violated the prohibitions of subpart B of this part concerning controlled substances. The employer's determination that reasonable suspicion exists to require the driver to undergo a controlled substances test must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the driver. The observations may include indications of the chronic and withdrawal effects of controlled substances.

(c) The required observations for alcohol and/or controlled substances reasonable suspicion testing shall be made by a supervisor or company official who is trained in accordance with § 382.603 of this part. The person who makes the determination that reasonable suspicion exists to conduct an alcohol test shall not conduct the alcohol test of the driver.

(d) Alcohol testing is authorized by this section only if the observations required by paragraph (a) of this section are made during, just preceding, or just after the period of the work day that the driver is required to be in compliance with this part. A driver may be directed by the employer to only undergo reasonable suspicion testing while the driver is performing safety-sensitive functions, just before the driver is to perform safety-sensitive functions, or just after the driver has ceased performing such functions.

(e)(1) If an alcohol test required by this section is not administered within two hours following the determination under paragraph (a) of this section, the employer shall prepare and maintain on file a record stating the reasons the alcohol test was not promptly administered. If an alcohol test required by this section is not administered within eight hours following the determination under paragraph (a) of this section, the employer shall cease attempts to administer an alcohol test and shall state in the record the reasons for not administering the test.

* * *

(4) Notwithstanding the absence of a reasonable suspicion alcohol test under this section, no driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions while the driver is under the influence of or impaired by alcohol, as shown by the behavioral, speech, and performance indicators of alcohol misuse, nor shall an employer permit the driver to perform or continue to perform safety-sensitive functions, until:

(i) An alcohol test is administered and the driver's alcohol concentration measures less than 0.02; or

(ii) Twenty four hours have elapsed following the determination under paragraph (a) of this section that there is reasonable suspicion to believe that the driver has violated the prohibitions in this part concerning the use of alcohol.

(5) Except as provided in paragraph (e)(2) of this section, no employer shall take any action under this part against a driver based solely on the driver's behavior and appearance, with respect to alcohol use, in the absence of an alcohol test. This does not prohibit an employer with independent authority of this part from taking any action otherwise consistent with law.

(f) A written record shall be made of the observations leading to a controlled substance reasonable suspicion test, and signed by the supervisor or company official who made the observations, within 24 hours of the observed behavior or before the results of the controlled substances test are released, whichever is earlier.

§ 382.307 Return-to-duty testing

(a) Each employer shall ensure that before a driver returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited by subpart B of this part concerning alcohol, the driver shall undergo a return-to-duty alcohol test with a result indicating an alcohol concentration of less than 0.02.

(b) Each employer shall ensure that before a driver returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited by subpart B of this part concerning controlled substances, the driver shall undergo a return-to-duty controlled substances test with a result indicating a verified negative result for controlled substances use.

§ 382.311 Follow-up testing

(a) Following a determination under § 382.605(b) that a driver is in need of assistance in resolving problems associated with alcohol misuse and/or use of controlled substances, each employer shall ensure that the driver is subject to unannounced follow-up alcohol and/or controlled substances testing as directed by a substance abuse professional in accordance with the provisions of § 382.605(c)(2)(ii).

(b) Follow-up alcohol testing shall be conducted only when the driver is performing safety-sensitive functions, just before the driver is to perform safety-sensitive functions, or just after the driver has ceased performing safety-sensitive functions.

Subpart D—Handling Of Test Results, Record Retention, and Confidentiality

* * *

§ 382.413 Inquiries for alcohol and controlled substances information from previous employers

(a)(1) An employer shall, pursuant to the driver's written authorization, inquire about the following information on a driver from the driver's previous employers, during the preceding two years from the date of application, which are maintained by the driver's previous employers under § 382.401(b)(1)(i) through (iii) of this subpart:

(i) Alcohol tests with a result of 0.04 alcohol concentration or greater;

(ii) Verified positive controlled substances test results; and

(iii) Refusals to be tested.

(2) The information obtained from a previous employer may contain any alcohol and drug information the previous employer obtained from other previous employers under paragraph (a)(1) of this section.

(b) If feasible, the information in paragraph (a) of this section must be obtained and reviewed by the employer prior to the first time a driver performs safety-sensitive functions for the employer. If not feasible, the information must be obtained and reviewed as soon as possible, but no later than 14-calendar days after the first time a driver performs safety-sensitive functions for the employer. An employer may not permit a driver to perform safety-sensitive functions after 14 days without having made a good faith effort to obtain the information as soon as possible. If a driver hired or used by the employer ceases performing safety-sensitive functions for the employer before expiration of the 14-day period or before the employer has obtained the information in paragraph (a) of this section, the employer must still make a good faith effort to obtain the information.

(c) An employer must maintain a written, confidential record of the information obtained under paragraph (a) or (f) of this section. If, after making a good faith effort, an employer is unable to obtain the information from a previous employer, a record must be made of the efforts to obtain the information and retained in the driver's qualification file.

(d) The prospective employer must provide to each of the driver's previous employers the driver's specific, written authorization for release of the information in paragraph (a) of this section.

(e) The release of any information under this section may take the form of personal interviews, telephone interviews, letters, or any other method of transmitting information that ensures confidentiality.

(f) The information in paragraph (a) of this section may be provided directly to the prospective employer by the driver, provided the employer assures itself that the information is true and accurate.

(g) An employer may not use a driver to perform safety-sensitive functions if the employer obtains information on a violation of the prohibitions in subpart B of this part by the driver, without obtaining information on subsequent compliance with the referral and rehabilitation requirements of § 382.605 of this part.

(h) Employers need not obtain information under paragraph (a) of this section generated by previous employers prior to the starting dates in § 382.115 of this part.

Subpart E—Consequences for Drivers Engaging in Substance Use-Related Conduct

§ 382.501 Removal from safety-sensitive function

(a) Except as provided in subpart F of this part, no driver shall perform safety-sensitive functions, including driving a commercial motor vehicle, if the driver has engaged in conduct prohibited by subpart B of this part or an alcohol or controlled substances rule of another DOT agency.

(b) No employer shall permit any driver to perform safety-sensitive functions, including driving a commercial motor vehicle, if the employer has determined that the driver has violated this section.

(c) For purposes of this subpart, commercial motor vehicle means a commercial motor vehicle in commerce as defined

in § 382.107, and a commercial motor vehicle in interstate commerce as defined in Part 390 of this subchapter.

§ 382.503 Required evaluation and testing

No driver who has engaged in conduct prohibited by subpart B of this part shall perform safety-sensitive functions, including driving a commercial motor vehicle, unless the driver has met the requirements of § 382.605. No employer shall permit a driver who has engaged in conduct prohibited by subpart B of this part to perform safety-sensitive functions, including driving a commercial motor vehicle unless the driver has met the requirements of § 382.605.

§ 382.505 Other alcohol-related conduct

(a) No driver tested under the provisions of subpart C of this part who is found to have an alcohol concentration of 0.02 or greater but less than 0.04 shall perform or continue to perform safety-sensitive functions for an employer, including driving a commercial motor vehicle, nor shall an employer permit the driver to perform or continue to perform safety-sensitive functions, until the start of the driver's next regularly scheduled duty period, but not less than 24 hours following administration of the test.

(b) Except as provided in paragraph (a) of this section, no employer shall take any action under this part against a driver based solely on test results showing an alcohol concentration less than 0.04. This does not prohibit an employer with authority independent of this part from taking any action otherwise consistent with law.

§ 382.507 Penalties

Any employer or driver who violates the requirements of this part shall be subject to the penalty provisions of 49 U.S.C. section 521(b).

Subpart F—Alcohol Misuse and Controlled Substances Use Information, Training, and Referral

§ 382.601 Employer obligation to promulgate a policy on the misuse of alcohol and use of controlled substances

(a) *General requirements.* Each employer shall provide educational materials that explain the requirements of this part and the employer's policies and procedures with respect to meeting these requirements.

(1) The employer shall ensure that a copy of these materials is distributed to each driver prior to the start of alcohol and controlled substances testing under this part and to each driver subsequently hired or transferred into a position requiring driving a commercial motor vehicle.

(2) Each employer shall provide written notice to representatives of employee organizations of the availability of this information.

(b) *Required content.* The materials to be made available to drivers shall include detailed discussion of at least the following:

(1) The identity of the person designated by the employer to answer driver questions about the materials;

(2) The categories of drivers who are subject to the provisions of this part;

(3) Sufficient information about the safety-sensitive functions performed by those drivers to make clear what period of the work day the driver is required to be in compliance with this part;

(4) Specific information concerning driver conduct that is prohibited by this part;

(5) The circumstances under which a driver will be tested for alcohol and/or controlled substances under this part, including post-accident testing under § 382.303(d);

(6) The procedures that will be used to test for the presence of alcohol and controlled substances, protect the driver and the integrity of the testing processes, safeguard the validity of the test results, and ensure that those results are attributed to the correct driver, including post-accident information, procedures and instructions required by § 382.303(d) of this part;

(7) The requirement that a driver submit to alcohol and controlled substances tests administered in accordance with this part;

(8) An explanation of what constitutes a refusal to submit to an alcohol or controlled substances test and the attendant consequences;

(9) The consequences for drivers found to have violated subpart B of this part, including the requirement that the driver be removed immediately from safety-sensitive functions, and the procedures under § 382.605;

(10) The consequences for drivers found to have an alcohol concentration of 0.02 or greater but less than 0.04;

(11) Information concerning the effects of alcohol and controlled substances use on an individual's health, work, and personal life; signs and symptoms of an alcohol or a controlled substances problem (the driver's or a coworker's); and available methods of intervening when an alcohol or a controlled substances problem is suspected, including confrontation, referral to any employee assistance program and or referral to management.

(c) *Optional provision.* The materials supplied to drivers may also include information on additional employer policies with respect to the use of alcohol or controlled substances,

including any consequences for a driver found to have a specified alcohol or controlled substances level, that are based on the employer's authority independent of this part. Any such additional policies or consequences must be clearly and obviously described as being based on independent authority.

(d) *Certificate of receipt.* Each employer shall ensure that each driver is required to sign a statement certifying that he or she has received a copy of these materials described in this section. Each employer shall maintain the original of the signed certificate and may provide a copy of the certificate to the driver.

§ 382.603 Training for supervisors

Each employer shall ensure that all persons designated to supervise drivers receive at least 60 minutes of training on alcohol misuse and receive at least an additional 60 minutes of training on controlled substances use. The training will be used by the supervisors to determine whether reasonable suspicion exists to require a driver to undergo testing under § 382.307. The training shall include the physical, behavioral, speech, and performance indicators of probable alcohol misuse and use of controlled substances.

§ 382.605 Referral, evaluation, and treatment

(a) Each driver who has engaged in conduct prohibited by subpart B of this part shall be advised by the employer of the resources available to the driver in evaluating and resolving problems associated with the misuse of alcohol and use of controlled substances, including the names, addresses, and telephone numbers of substance abuse professionals and counseling and treatment programs.

(b) Each driver who engages in conduct prohibited by subpart B of this part shall be evaluated by a substance abuse professional who shall determine what assistance, if any, the

employee needs in resolving problems associated with alcohol misuse and controlled substances use.

(c)(1) Before a driver returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited by subpart B of this part, the driver shall undergo a return-to-duty alcohol test with a result indicating an alcohol concentration of less than 0.02 if the conduct involved alcohol, or a controlled substances test with a verified negative result if the conduct involved a controlled substance.

(2) In addition, each driver identified as needing assistance in resolving problems associated with alcohol misuse or controlled substances use,

(i) Shall be evaluated by a substance abuse professional to determine that the driver has properly followed any rehabilitation program prescribed under paragraph (b) of this section, and

(ii) Shall be subject to unannounced follow-up alcohol and controlled substances tests administered by the employer following the driver's return to duty. The number and frequency of such follow-up testing shall be as directed by the substance abuse professional, and consist of at least six tests in the first 12 months following the driver's return to duty. The employer may direct the driver to undergo return-to-duty and follow-up testing for both alcohol and controlled substances, if the substance abuse professional determines that return-to-duty and follow-up testing for both alcohol and controlled substances is necessary for that particular driver. Any such testing shall be performed in accordance with the requirements of 49 CFR part 40. Follow-up testing shall not exceed 60 months from the date of the driver's return to duty. The substance abuse professional may terminate the requirement for follow-up testing at any time after the first six tests have been administered, if the substance abuse professional determines that such testing is no longer necessary.

(d) Evaluation and rehabilitation may be provided by the employer, by a substance abuse professional under contract with the employer, or by a substance abuse professional not affiliated with the employer. The choice of substance abuse professional and assignment of costs shall be made in accordance with employer/driver agreements and employer policies.

(e) The employer shall ensure that a substance abuse professional who determines that a driver requires assistance in resolving problems with alcohol misuse or controlled substances use does not refer the driver to the substance abuse professional's private practice or to a person or organization from which the substance abuse professional receives remuneration or in which the substance abuse professional has a financial interest. This paragraph does not prohibit a substance abuse professional from referring a driver for assistance provided through—

(1) A public agency, such as a State, county, or municipality;

(2) The employer or a person under contract to provide treatment for alcohol or controlled substance problems on behalf of the employer;

(3) The sole source of therapeutically appropriate treatment under the driver's health insurance program; or

(4) The sole source of therapeutically appropriate treatment reasonably accessible to the driver.

(f) The requirements of this section with respect to referral, evaluation and rehabilitation do not apply to applicants who refuse to submit to a pre-employment alcohol or controlled substances test or who have a pre-employment alcohol test with a result indicating an alcohol concentration of 0.04 or greater or a controlled substances test with a verified positive test result.

(12)

FILED
JUL 31 2000
CLERK

No. 99-1038

IN THE

Supreme Court of the United States

EASTERN ASSOCIATED COAL CORPORATION,
Petitioner,

v.

UNITED MINE WORKERS OF AMERICA, DISTRICT 17;
LOCAL 1503, UNITED MINE WORKERS OF AMERICA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENTS

GRANT CRANDALL
JUDITH RIVLIN
UNITED MINE WORKERS OF AMERICA
8315 Lee Highway
Fairfax, VA 22031-2215

CHARLES F. DONNELLY
DONNELLY & CARBONE
No. 8 Capitol Street
Suite 300
Charleston, WV 25321

LAURENCE GOLD
BREDHOFF & KAISER
805 15th Street, N.W.
Washington, DC 20005

JOHN R. MOONEY *
RICHARD W. GIBSON
DANIEL E. KORNFELD
MOONEY, GREEN, GLEASON, BAKER GIBSON, & SAINDON, P.C.
1920 L St., N.W., Suite 400
Washington, DC 20036
(202) 783-0010

JONATHAN P. HIATT
JAMES B. COPPESS
AFL-CIO
815 16th Street, N.W.
Washington, DC 20006

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	7
ARGUMENT	9
I. There is No Conflict Between the Labor Arbitrarion Award Here and the Omnibus Testing Act or the DOT Regulations Implementing that Act	9
II. The LMRA § 301 Public Policy Exception Justifies a Court's Refusal to Enforce a Labor Arbitration Award Only if the Award Itself, or the Conduct the Award Requires, Violates Positive Law	26
CONCLUSION	35

TABLE OF AUTHORITIES

Cases: Page

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) 28
American Postal Workers v. United States Postal Service, 789 F.2d 1 (D.C. Cir. 1986) 27
Bowen v. United States Postal Service, 459 U.S. 212 (1983) 28
Buffalo Forge Co. v. Steelworkers, 428 U.S. 397 (1976) 29
California Brewers Ass'n v. Bryant, 444 U.S. 598 (1980) 30
Carbon Fuel Co. v. Mine Workers, 444 U.S. 212 (1980) 30, 31
Dowd Box Co. v. Courtney, 368 U.S. 502 (1962) 33
Drake Bakeries v. Bakery Workers, 370 U.S. 254 (1962) 29
E.I. DuPont de Nemours v. Grasselli Employees Ass'n, 790 F.2d 611 (7th Cir.), *cert. denied*, 479 U.S. 853 (1986) 13, 27
Gateway Coal Co. v. Mine Workers, 414 U.S. 368 (1974) 29, 34
Gateway Coal Co. v. United Mine Workers, 466 F.2d 1157 (3rd Cir. 1972) 34
Hines v. Anchor Motor Freight, 424 U.S. 554 (1976) 29
Kaiser Steel Corp. v. Mullins, 455 U.S. 72 (1982) 35
Muschany v. United States, 324 U.S. 49 (1945) 11
Northwest Airlines v. Air Line Pilots, 808 F.2d 76 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1014 (1988) 13
Paperworkers v. Misco, 484 U.S. 29 (1987) ..... *passim*

TABLE OF AUTHORITIES—Continued

	Page
Stead Motors v. Automotive Machinists Lodge 1173, 886 F.2d 1200 (9th Cir.1989) *cert. denied*, 495 U.S. 946 (1990)	13
Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960)	29
Steelworkers v. Enterprise Wheel Corp., 363 U.S. 593 (1960)	30, 32
Steelworkers v. Warrior & Gulf Co., 363 U.S. 574 (1960)	28, 29
Teamsters Local v. Lucas Flour Co., 369 U.S. 95 (1962)	28, 29, 31
Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957)	28
Trans World Airlines v. Hardison, 432 U.S. 63 (1977)	30
UMWA Health & Retirement Funds v. Robinson, 455 U.S. 562 (1982)	30
Wilder v. G.L. Bus Lines, 2000 U.S. Dist. LEXIS 9524 (S.D.N.Y. 2000)	33
W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757 (1983)	10, 11

Statutes and regulations:

Labor-Management Relations Act of 1947, 61 Stat. 13:	
§ 201, 29 U.S.C. § 171	30, 34
§ 203, 29 U.S.C. § 173	29
§ 301, 29 U.S.C. § 185	*passim*
Omnibus Transportation Employee Testing Act of 1991, Tit. V, P.L. 102-143, 105 Stat. 952 (1991)	9
§ 2(7)	16

TABLE OF AUTHORITIES—Continued

	Page
49 U.S.C. § 31306(b)	14
49 U.S.C. § 31308	17
C.F.R. Part 382	14
§ 382.101	16
§ 382.111	22, 23
§ 382.301	15
§ 382.303	15
§ 382.305	15
§ 382.307	15
§ 382.309(b)	26
§ 382.501(b)	17
§ 382.601(c)	22
§ 382.605	17
49 C.F.R. § 383.51(b)	19
49 C.F.R. § 391.15(c)	19
Miscellaneous:	
53 Fed. Reg. 22268 (1988)	21
53 Fed. Reg. 47134 (1988)	15, 20, 21, 25
57 Fed. Reg. 59382 (1992)	20
57 Fed. Reg. 59567 (1992)	15, 18, 19, 21, 25
59 Fed. Reg. 7302 (1994)	20, 22
59 Fed. Reg. 7484 (1994)	15, 19, 20, 22
S. Rep. No. 102-54, 102d Cong., 1st Sess. (1991)	23
Easterbrook, "Arbitration, Contract, and Public Policy," in *Arbitration 1991: The Changing Face of Arbitration in Theory and Practice*, Proceedings of the Forty-Fourth Annual Meeting, National Academy of Arbitrators (1992)	27

TABLE OF AUTHORITIES—Continued

Page

Edwards, *Judicial Review of Labor Arbitration Awards: The Clash Between the Public Policy Exception and the Duty to Bargain*, 64 Chicago-Kent L. Rev. 3 (1988) 27

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U.S. Dept. of Labor, Bureau of Labor Statistics, *Alcohol and Drug Abuse Provisions in Major Collective Bargaining Agreements* (Oct. 1990) 33

U.S. Dept. of Transportation, *Regulatory Guidance to the Motor Carrier Safety Regulations* (April 1, 2000) 15, 18, 19, 20

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

Petitioner, Eastern Associated Coal Corporation, and Respondents, United Mine Workers of America, District 17, and United Mine Workers of America, Local Union 1503 (collectively "Union") are parties to a collective bargaining agreement known as the National Bituminous Coal Wage Agreement ("Wage Agreement"). The Wage Agreement covers a wide variety of mining and related jobs at Eastern Coal and other mining companies.

A. Article XXIV of the Wage Agreement sets out a detailed "Discharge Procedure." Jt. App. 30-32.

Section (a) of Article XXIV establishes the following standards with respect to employee discharges:

> No Employee covered by this Agreement may be disciplined or discharged except for just cause. The burden shall be on the Employer to establish grounds for discharge in all proceedings under this Agreement. [Jt. App. 30.]

Sections (b)-(d) of Article XXIV, in their turn, provide a three step process that an employer must follow in order to perfect the discharge of an employee. Jt. App. 30-31.

The first step in the discharge process is for "the Employee [to] be suspended with intent to discharge and . . . given written notice stating the reason, with a copy to the [Union's] Mine Committee." Jt. App. 30.

The next step in the process is a meeting—to be held "[a]fter 24 hours, but within 48 hours" of the written notice—between the employee and a member of the Union Mine Committee (and on request a representative of the Mine Workers District), on the one hand, and the "mine superintendent or manager" (and sufficient other

representatives of the employer to have an equal number with the Union at the meeting), on the other. Jt. App. 30. "If the Employer informs the Employee at the meeting . . . that he still intends to discharge the Employee . . ., the Employee remains suspended with intent to discharge for a period of time necessary to permit him to file a grievance and have it arbitrated." *Id.* "If the Employee does not file a grievance within five days of the notice of suspension with intent to discharge, the discharge shall become effective immediately." *Id.* at 30-31.

As the third step in the process, section (d) of Article XXIV provides for "Immediate Arbitration" that may be invoked if the Union "believes that just cause for discharge does not exist." Jt. App. 31.[1] Once the immediate arbitration procedure has been invoked, "[t]he next available district arbitrator [is] immediately . . . assigned to hear the case" and must "hear the case within five days." *Id.* "At the conclusion of the hearing, the district arbitrator . . . announce[s] his decision which [is] binding on all parties." *Id.*

"If the arbitrator determines that there was just cause for the discharge, the discharge shall become effective upon the date of the arbitrator's decision." Jt. App. 31. If the arbitrator determines that there is not just cause, the employee is reinstated. *Id.*

B. On July 14, 1997, Eastern Coal initiated discharge proceedings against James Smith, an employee who began work at Eastern Coal in 1980 and held a variety of positions at the Company over the ensuing seventeen years. Pet. App. 7a, 24a & 26a. At that time, Smith was employed as a Mobile Equipment Operator ("MEO") on an Eastern Coal

---

[1] Section (e) provides: "If neither the Employee nor the Mine Committee request immediate arbitration, the Employee shall be discharged at the conclusion of the fifth day of his suspension, and his case shall be processed in accordance with the provisions of Article XXIII (Settlement of Disputes)." Jt. App. 31.

road crew. *Id.* at 6a. The road crew's function is to maintain mine haulage roads. *Id.* Because MEOs may operate equipment on public roads and highways, they are required to have a commercial driver's license and are subject to the Federal Motor Carrier Safety Regulations of the U.S. Department of Transportation ("DOT regulations"), including the drug testing provisions of those regulations. *Id.*

The Company's suspension letter stated that the grounds for seeking Smith's discharge were: "Testing positive for illegal substances (cannabinoids) 2nd offense. Violation of company's drug and alcohol policy." Pet. App. 24a. Eastern Coal's drug policy provides that "[i]f a driver submits a urine specimen for the purpose of a drug test, and the test shows positive levels . . . the driver will be removed from any safety sensitive position and subject to disciplinary action up to and including termination." *Id.* at. 9a n. 4.

Smith filed a grievance challenging the Company's action on July 17, and the Union invoked the immediate arbitration procedure. Pet. App. 24a-25a. The arbitrator (Jerome T. Barrett) heard the Smith grievance on July 28. *Id.* at. 23a. At the hearing, the Company and the Union each presented witnesses and extensive documentary evidence, including copies of the DOT regulations and the Eastern Coal drug policy. *Id.* at. 23a & 27a. Two hours after the close of the hearing, Arbitrator Barrett issued a bench award. *Id.* at. 23a. The arbitrator subsequently submitted his written opinion and award on August 1. *Id.* at. 29a.

The issues presented to Arbitrator Barrett were the following:

> Was the suspension with intent to discharge of grievant James Smith on July 14, 1997 for just cause?
>
> And, if not, what is the appropriate remedy? [Pet. App. 24a.]

Based on Smith's "creditable" testimony, Arbitrator Barrett found that the positive drug test in question was a "one time

lapse" caused by "a personal/family problem." Pet. App. 28a. Given this finding, and taking into consideration Smith's "excellent employment record during 17 years with the company," *id.* at 26a, the arbitrator determined that there was not "just cause" to discharge Smith.

In reaching his conclusion, Arbitrator Barrett gave careful consideration to the fact that Smith had previously tested positive for marijuana in March 1996, that the Company had attempted to discharge Smith on that occasion, and that Arbitrator Ross had reduced the discharge to a 30-day suspension without pay. Pet. App. 25a.[2] Arbitrator Barrett noted that Arbitrator Ross' award required that Smith participate in a substance abuse program and submit to random drug testing by the prior arbitration, *id.*, and that Smith "appeared to be making a good faith effort to be rehabilitated." *Id.* at 27a. In this regard, Arbitrator Barrett observed that Smith had "tested negative on April 24, 1996, July 16, 1996, October 11, 1996, and January 27, 1997." *Id.* at 26a.

Arbitrator Barrett also gave careful consideration to the fact that "drugs have a negative impact on job performance, safety and company liability." Pet. App. 28a. To meet this concern, the arbitrator carefully crafted the remedy "to assure that the company and union will not be required to use arbitration again for this grievant where drugs are involved." *Id.*

The "Award" entered by Arbitrator Barrett provided:

The grievance is sustained and the grievant is returned to work on October 20, 1997 under the following conditions:

---

[2] The 1996 positive test occurred when Smith bid to transfer from his job as a drilling operator to become a Mobile Equipment Operator. Pet. App. 7a. A drug test was required at that time, under the DOT regulations, because the MEO position requires a commercial driver's license. *Id.*

1. No back pay for any loss during his suspension.

2. The award by Arbitrator Ross in CAS No. 93-17-96-472 is reinstated.

3. Grievant will reimburse the Company and the Union for the arbitrators' bills in both the Ross and Barrett cases.

4. Grievant will provide the Union and the Company with a signed, undated letter of resignation which the Company may date and accept if the Grievant tests positive for any illegal drug in the next five years.

5. During the Grievant's suspension periods, the Grievant's name shall remain in the Company's random drug testing program. If the Grievant fails to take a required test during his suspension, the Company can date and accept his resignation letter.

6. The Company and Union may agree that unusual or unforeseen circumstances justify waiving any conditions set forth above. [Pet. App. at 29a.]

Pursuant to its obligations under the DOT regulations, Eastern Coal had referred Smith to Southern Highland Community Mental Health Center for rehabilitation. *See* 49 CFR § 382.605(a). And, shortly after Arbitrator Barrett issued his award, Smith enrolled in a six week drug education program at the Southern Highland Center. Def. Mine Workers' Combined Mem. App. B, Ex. 3 (Dkt. 29). On October 14, 1997, Sandy Rogers, a Substance Abuse Counselor at the Center, wrote to Glen Forren, Eastern Coal's Manager of Employee Relations, certifying that Smith had "successfully completed" the program. *Id.*

C. On August 18, 1997, Eastern Coal filed suit in the Southern District of West Virginia "to vacate [the] labor arbitration award," invoking the district court's jurisdiction pursuant to § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. Jt. App. 7. The Union filed a counterclaim seeking enforcement of the award. *Id.* at 19-20.

In the district court, Eastern Coal's primary basis for challenging the award—and the only basis that is still pertinent in this Court—was that "[b]ecause the Barrett Award refuses to allow EACC to discharge Mr. Smith for testing positive for illegal drug use while employed in the MEO position," the award "violates the well-defined and dominant public policy against performance of safety-sensitive jobs while under the influence of illegal drugs." Jt. App. 11-12. In this regard, the Company claimed that, "[b]ecause the Barrett Award clearly violates this public policy, it does not draw its essence from the Wage Agreement and it must be vacated." *Id.* at 12.

Ruling on cross-motions for summary judgment, the district court (Cohenhaver, J.) determined that "Arbitrator Barrett's award draws its essence from the Wage Agreement," Pet. App. 17a, and that "the public policy exception does not apply inasmuch as the arbitrator's award is consistent with the DOT Regulations," *id.* at 21a. The district court found that the award drew its essence from the agreement on the following grounds:

> Inasmuch as the substance abuse policy calls for the removal of employees in safety sensitive positions, but does not call for mandatory discharge, the court finds that the arbitrator's award, suspending Mr. Smith for two and one-half months without pay, and reinstating him subject to strict conditions, is "rationally inferable" from the Wage Agreement. [*Id.* at 16a.]

And, the court concluded that the award was not contrary to public policy for the following reasons:

> Here, the arbitrator ordered reinstatement of Mr. Smith, subject, however, to several conditions, including continued random drug testing and mandatory resignation in the event of a future positive drug test. Because the DOT Regulations do not make it illegal to reinstate employees who test positive for drug use, it

> cannot be said that the DOT Regulations specifically militate against the relief ordered by the arbitrator in this case. [*Id.* at 21a (internal quotation marks and citation omitted).]

Based on these rulings, the district court entered judgment enforcing the award. *Id.*

On appeal, the Fourth Circuit (Widener, Ervin & Wilkins, JJ.) affirmed the district court in an unpublished per curiam decision. Pet App. 4a. Eastern Coal's petition for rehearing *en banc* was denied without a single member of the Fourth Circuit calling for a poll of the court. *Id.* at 22a.

SUMMARY OF ARGUMENT

I. Under § 301 of the Labor Management Relations Act, a court may "refus[e] to enforce an arbitrator's award under a collective-bargaining agreement because it is contrary to public policy" if, and only if, the award "violate[s] some explicit public policy that is well-defined and dominant, and is to be ascertained by reference to the laws and legal precedents," and thus "create[s] an[] explicit conflict with [those] laws and legal precedents." *Paperworkers v. Misco*, 484 U.S. 29, 42 & 43 (1987).

Eastern Coal challenges as contrary to "public policy" an arbitration award reinstating—subject to stringent sanctions and preconditions—an employee who tested positive for marijuana. The "public policy" relied upon by Eastern Coal in challenging the arbitration award is the policy of the Omnibus Transportation Employee Testing Act of 1991 and the regulations issued by the Department of Transportation pursuant to that statute. The courts below properly rejected this challenge to the arbitrator's application of the "just cause" provision in the governing collectively bargained "Discharge Procedure."

The Omnibus Testing Act and the DOT regulations do not call for the discharge of an employee who has tested positive

for drugs. Rather, the regulations provide that such an employee is to be removed from a safety sensitive job until the employee has completed the specified rehabilitation program and tested negative in the specified return-to-duty drug test.

In its rulemaking process, DOT considered imposing short periods of suspension from employment for employees who test positive, but decided against imposing those penalties in issuing the final regulations. DOT also considered requiring employers to retain employees on the payroll during the rehabilitation process and considered according employees a public right to return to their safety sensitive position once they completed rehabilitation and tested negative.

But in the end, and in conformity with employer requests, DOT determined that these matters should be left to private decisionmaking, including through collective bargaining. And, the final regulations expressly preserve whatever rights in this regard employees may have through contract, including a collective bargaining agreement.

Given DOT's considered decision to leave questions of discharge based on positive drug tests to labor-management negotiations, an arbitration award that reinstates an employee—subject to substantial sanctions and conditions consistent with the requirements of the regulations—cannot possibly be contrary to the public policy of the Omnibus Testing Act and the DOT regulations.

II. The federal law of contracts under LMRA § 301 is derived from federal labor policy. Thus, each component part of the § 301 contract law—including the "public policy" exception to the enforcement of arbitration awards—must be consistent with federal labor policy.

Federal labor policy strongly favors the enforcement of agreements to settle labor disputes by binding arbitration.

Federal labor policy also strongly favors free collective bargaining and discourages government interference in setting the terms of collective bargaining agreements.

The only LMRA § 301 public policy standard that gives proper weight to these two basic federal labor policies is the standard that provides a carefully delimited judicial authority to set aside an arbitration award where the award itself is unlawful or where the award directs one of the parties to engage in unlawful conduct.

In contrast, the imprecise and general public policy standard advocated by Eastern Coal goes too far toward undermining the finality of arbitration awards and toward permitting the courts to substitute their resolution of a collective bargaining issue for the resolution provided by the parties in their agreement to be a proper LMRA § 301 public policy standard.

ARGUMENT

I. THERE IS NO CONFLICT BETWEEN THE LABOR ARBITRATION AWARD HERE AND THE OMNIBUS TESTING ACT OR THE DOT REGULATIONS IMPLEMENTING THAT ACT.

A. Eastern Coal's claim in this case is that a labor arbitration award rendered under the governing collective bargaining agreement is contrary to the public policy of the Omnibus Transportation Employee Testing Act of 1991, P.L. 102-143, Tit. V, 105 Stat. 952 (1991)("Omnibus Testing Act"), and the implementing Department of Transportation regulations and that the award is, therefore, unenforceable.

The arbitration award in question concludes that, in the circumstances, Eastern Coal employee James Smith's June 27, 1997 positive drug test for marijuana did not provide the contractually required "just cause" for Eastern Coal to

discharge Smith. On that basis, the award reduces Smith's discharge to a three month unpaid suspension from employment and—provided that Smith meets four specified conditions—orders him "returned to work" following that suspension. Pet. App. 29a.[3]

Paperworkers v. Misco, 484 U.S. 29 (1987), the Court's most recent labor-arbitration/public-policy case, involved an employer public policy challenge to an arbitration award reinstating an employee who had been discharged from a hazardous job for alleged work-site marijuana possession. Eastern Coal's claim and the legal issue the claim raises thus track the *Misco* employer's claim and the legal issue there. That being so, the basic principles stated in *Misco*—which elaborate on the approach of *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757 (1983)—provide the proper starting point for analyzing Eastern Coal's claim, and we therefore begin by summarizing those principles.

At the outset, *Misco* and *W. R. Grace* make it plain that in a suit brought under § 301 of the Labor-Management Relations Act, "a court may not enforce a collective-bargaining agreement that is contrary to public policy,' and . . . that 'the question of public policy is ultimately one for resolution by the court.' " *Misco*, 484 U.S. at 43 quoting *W.R. Grace*, 461 U.S. at 766.

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[3] The award imposes four conditions on Smith's reinstatement. First, by "reinstat[ing]" the earlier Ross award, Pet. App. 29a, which "required [Smith] to participate in a substance abuse program," *id.* at 25a, the award requires Smith to get whatever "counseling" is necessary, *id.* at 29a. Second, the award requires Smith to "reimburse the company and the union for the arbitrators' bills in both the Ross case and the instant case." *Id.* Third, Smith is required to "provide the union and company with a signed, undated letter of resignation which the company may date and accept if [Smith] tests positive for any illegal drug in the next five years." *Id.* Fourth, "[d]uring his period of suspension," Smith is required to participate "in the company's random drug testing program." *Id.*

At the same time, *Misco* and *W.R. Grace*

> caution[] . . . that a court's refusal to enforce an arbitrator's *interpretation* of such contracts is limited to situations where the contract as interpreted would violate "some explicit public policy" that is "well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.' " [*Misco*, 484 U.S. at 43 (emphasis in original), quoting *W.R. Grace*, 461 U.S. at 766, quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945).]

Misco then identifies "[t]wo points [that] follow from *W.R. Grace*":

> First, a court may refuse to enforce a collective-bargaining agreement when the specific terms contained in that agreement violate public policy. Second, it is apparent that our decision in that case does not otherwise sanction a broad judicial power to set aside arbitration awards as against public policy. [484 U.S. at 43.]

In the second regard, *Misco* and *W.R. Grace* state that the threshold question in the public policy "examination" is "whether the award create[s] any explicit conflict with other 'laws and legal precedents' rather than an assessment of 'general considerations of supposed public interests.' " *Misco*, 484 U.S. at 43, quoting *W.R. Grace*, 461 U.S. at 766. And, *Misco* emphasizes that "[a]t the very least, an alleged public policy must be properly framed under the approach set out in *W.R. Grace*, and the violation of such a policy must be clearly shown if an award is not to be enforced." 484 U.S. at 43.[4]

B. "At the very least," then, to prevail on its public policy claim Eastern Coal must "clearly show[]" that the arbitrator's

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[4] *Misco* held that the court of appeals' application of the public policy exception failed both of these requirements. *See* 484 U.S. at 44-45.

interpretation of the collective bargaining agreement in the Smith award "violate[s] some explicit public policy" in the Omnibus Testing Act and the implementing DOT regulations and thereby creates an "explicit conflict" with the statute and the regulations. *Misco*, 484 U.S. at 43.

Misco does not define or otherwise elaborate on the nature of the necessary "violation of [public] policy" and resulting "explicit conflict" between the award and positive law, except by way of example in finding no such violation or conflict there.[5] Given that limited guidance and the different glosses placed on *Misco* by the courts of appeals, the courts below—drawing on both the First, Fifth, Eighth and Eleventh Circuit cases relied upon by Eastern Coal, *see* Pet. Br. 22 n. 11, and on the Ninth Circuit case law—put the *Misco* standard into the following operational terms: "whether or not there is a well defined and dominant public policy militating against the arbitrator's decision in this case." Pet. App. 18a. *See id.* at

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[5] In this regard, the *Misco* Court stated:

> [T]he assumed connection between the marijuana gleanings found in Cooper's car and Cooper's actual use of drugs in the workplace is tenuous at best and provides an insufficient basis for holding that his reinstatement would actually violate the public policy identified by the Court of Appeals "against the operation of dangerous machinery by persons under the influence of drugs or alcohol." 768 F.2d, at 743. A refusal to enforce an award must rest on more than speculation or assumption. [484 U.S. at 44.]

And, the Court added that it would be wholly inappropriate for the court of appeals to draw inferences and make findings of fact as to whether an employee "had ever been or would be under the influence of marijuana while he was on the job" based on the court's review of the evidence:

> The parties did not bargain for the facts to be found by a court, but by an arbitrator chosen by them who had more opportunity to observe Cooper and to be familiar with the plant and its problems. Nor does the fact that it is inquiring into a possible violation of public policy excuse a court for doing the arbitrator's task. [*Id.* at 45.]

18a-20a.[6] Following that lead, we turn to an inquiry whether the Omnibus Testing Act and implementing DOT regulations in any sense "militate against the arbitrator's decision."

Succinctly stated, the arbitrator's interpretation of the collective bargaining agreement is the following: that the "just cause" provision limits Eastern Coal's prerogative to discharge bargaining unit employees who test positive for marijuana, including those who test positive while holding truck driving positions; that, in the circumstances, the discharge of Smith transgressed those limits; and that after Smith had served a three month unpaid suspension, and fulfilled other conditions, Eastern Coal was required to return him to work in the bargaining unit.

According to Eastern Coal, that interpretation of the collective bargaining agreement "makes a mockery of the drug testing regime mandated by Congress [in the Omnibus Testing Act] and the DOT regulations." Pet. Br. 43. As the Brief for the United States ("U.S. Br.") filed in this case demonstrates, and as we develop below, Eastern Coal

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[6] The "militates against" standard was articulated by the Ninth Circuit. *See Stead Motors v. Automotive Machinists Lodge 1173*, 886 F.2d 1200, 1212-13 (9th Cir. 1989)(*en banc* plurality opinion), *cert. denied*, 495 U.S. 946 (1990), citing the majority opinion in *E.I. DuPont de Nemours v. Grasselli Employees Ass'n*, 790 F.2d 611, 615-616 (7th Cir.), *cert. denied*, 479 U.S. 853 (1986).

Conspicuously absent from the precedents cited by the courts below are those of the District of Columbia Circuit, the one circuit that has expressly limited the public policy exception to cases where the arbitration award requires a violation of law. *See Northwest Airlines v. Air Line Pilots*, 808 F.2d 76, 83 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1014 (1988). *See also E.I. DuPont de Nemours v. Grasselli Employees Ass'n*, 790 F.2d at 617-620 (Easterbrook, J., concurring). In view of Eastern Coal's assertion, Pet. Br. 28-29, that the courts below followed the D.C. Circuit's lead, it is significant that the Ninth Circuit has expressly reserved judgment on the validity of the D.C. Circuit's standard. *Stead Motors v. Automotive Machinists Lodge 1173*, 886 F.2d at 1212 n. 12.

completely misunderstands the Omnibus Testing Act drug-testing regime.

The Omnibus Testing Act and the DOT regulations neither mandate the discharge of covered employees who test positive nor grant employers an absolute prerogative to effect such discharges. To the contrary, "[t]he DOT regulations expressly contemplate the prospect that drivers who test positive will (after completion of specified requirements) eventually be permitted to resume safety-sensitive duties." U.S. Br. 22-23. The regulations both "establish legal prerequisites to the resumption of safety-sensitive duties by drivers who have tested positive for illegal drugs" and "leav[e] to private ordering the determination whether such workers will in fact be reinstated." *Id.* at 15.

The brief for the United States then concludes, with the most scrupulous understatement, that since "[t]he regulations . . . reflect the view that the decision whether reinstatement is advisable in a particular case is appropriately left to private ordering," it is "difficult to see how reinstatement in accordance with the regulatory requirements, when decreed by the parties' chosen decisionmaker, could make a 'mockery' of the agency's rules." U.S. Br. 23.

C. The Omnibus Testing Act, in the most general terms, directs the Secretary of Transportation to "prescribe regulations that establish a program requiring motor carriers to conduct . . . testing of operators of commercial vehicles for the use of a controlled substance." 49 U.S.C. § 31306(b)(1)(A). Thus, it is the Secretary's comprehensive drug testing regulations that elaborate the Act's basic commands. 49 CFR Part 382. The regulations in effect at the time of Smith's discharge were issued on February 15, 1994 by the Department of Transportation's Federal Highway

Administration ("FHWA"). 59 Fed. Reg. 7484 (1994).[7] DOT has, moreover, supplemented the regulations with "Regulatory Guidance" issued through the Department's Federal Motor Carrier Safety Administration (formerly part of the FHWA). DOT, *Regulatory Guidance to the Motor Carrier Safety Regulations* (April 1, 2000) ("DOT, *Regulatory Guidance*").

1. As the Omnibus Testing Act directs, the DOT regulations provide for drug-testing of commercial motor vehicles drivers. Employers of such drivers are required to administer tests before a driver first performs safety-sensitive functions, 49 CFR § 382.301 ("Pre-employment testing"), and to continue to administer random drug tests during employment in a safety-sensitive position, 49 CFR § 382.305 ("Random testing"). In addition, employers must test drivers as soon as possible following an accident, 49 CFR § 382.303 ("Post-accident testing"), and whenever the employer reasonably suspects the driver has been using a controlled substance, 49 CFR § 382.307 ("Reasonable suspicion testing").

The purpose of the drug-testing regulations "is to establish programs designed to help prevent accidents and injuries resulting from the misuse of alcohol or use of controlled substances by drivers of commercial motor vehicles." 49

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[7] These regulations were based, in large part, on drug-testing regulations previously issued by the FHWA on November 21, 1988. 53 Fed. Reg. 47134 (1988). It is the DOT's understanding that in enacting the 1991 Omnibus Testing Act, "Congress recognized that the FHWA ha[d] already issued regulations for controlled substance testing" and that "it [wa]s the intent of Congress that FHWA's [1988] controlled substances regulations be incorporated into the regulations required to be issued under the Omnibus Act." 57 Fed. Reg. 59567 (1992). Given DOT's express reliance on the product of its 1988 rulemaking in framing the regulations issued in 1994, we draw upon the 1988 rulemaking materials insofar as they are pertinent to the 1994 regulations.

CFR § 382.101. The testing regime is designed to be a largely prophylactic means toward this end.

A positive drug test provides only the limited information that the employee has, at some prior point, used the controlled substance in question. The test result does *not* show that the employee was under the influence of the controlled substance at the time of testing.[8] It follows that the test cannot show that the employee has ever been under the influence of the controlled substance while at work or that the employee ever will be under the influence of a controlled substance while at work. That being so, some indeterminable number of drivers who test positive will not threaten the public by performing their safety-sensitive jobs while under the influence.

Given these limits and uncertainties, the fact that an employee tests positive standing alone does not dictate the employment consequences to be visited upon the employee in the interest of protecting public health and safety. That is particularly plain in the Omnibus Testing Act context, since Congress declared that "rehabilitation is a critical component of any testing program for . . . use of illegal drugs and should be made available to individuals, as appropriate," § 1(7), 105 Stat. at 953, and Congress directed the DOT to "prescribe regulations establishing requirements for rehabilitation programs that provide for the identification and opportunity for treatment of operators of commercial motor vehicles who are found to have used . . . a controlled substance," and to "decide on the circumstances under which those operators

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[8] As the United States explains in its brief:

> That rule [against reporting for duty after testing positive] does not reflect a judgment that every individual who tests positive for illegal drugs is in fact impaired. DOT has recognized that "drugs may stay in the body for some time and the presence of drugs in urine does not necessarily mean that the person was affected by the drugs on the day tested or during the performance of safety-sensitive functions." 57 Fed. Reg. at 59,393-59,394. [U.S. Br. at 14 n. 5.]

shall be required to participate in a program," 49 U.S.C. § 31308.

Against this background, DOT's determination of what is necessary on a positive drug test is as follows:

When a driver tests positive, the DOT regulations require the employer to take two steps. First, the employer must assure that the driver does not perform any safety-sensitive function until he or she has completed the rehabilitation process prescribed by the regulations. 49 CFR §§ 382.501(b) & 382.605(c). Second, the employer must inform the driver of the available rehabilitation resources. 49 CFR § 382. 605(a).

Section 382.605 of the regulations spells out the required rehabilitation process through which a driver, who has tested positive, may "return to duty" in a safety sensitive position. The driver is "evaluated by a substance abuse professional [SAP]" to "determine what assistance, if any, the employee needs in resolving problems associated with . . . controlled substance use" and to prescribe any necessary rehabilitation. 49 CFR § 382.605(b). Before returning to a "safety sensitive" job, the driver must pass "a controlled substances test with a verified negative result." 49 CFR § 382.605(c)(1). And, before a driver who has been "identified [by the SAP] as needing assistance in resolving problems associated with . . . controlled substance use," is permitted to return to safety-sensitive work, the driver is subject to further "evaulat[ion] by a substance abuse professional to determine that the driver has properly followed any rehabilitation program prescribed." 49 CFR § 382.605(c)(2)(i). On returning to work, the driver is also subject to "unannounced follow-up . . . controlled substances tests administered by the employer following the driver's return to duty . . . as directed by the substance abuse professional." 49 CFR § 382.605(c)(2)(ii).[9]

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[9] DOT has explained that "[e]mployees testing positive while in follow-up testing are subject to the same specific DOT operating

The Department of Transportation has summarized this "SAP process" as follows:

> Safety sensitive functions may not be performed until the individual has been evaluated by an SAP, complied with any recommended treatment, has been re-evaluated by an SAP, has been allowed by the SAP to return to work and has passed a return to duty test. [DOT, *Regulatory Guidance* § 382.501, Question 1.]

In other words, DOT treats a driver's positive random test as providing sufficient basis for concern that the driver might perform safety sensitive functions while under the influence to require the driver to be put to a program of professional evaluation, rehabilitation and retesting aimed at ending the driver's drug use and thereby alleviating that concern.

In reaching this conclusion, DOT did give consideration to imposing the additional employment consequence of short driving suspensions for drivers who tested positive for drug use more than once within a three year period. 57 Fed. Reg. at 59576 Table III & 59585 § 382.1107. The Department's 1992 proposed drug-testing regulations provided that "[a] driver who, during any 3-year period, is found to have a verified positive controlled substances test result twice in separate incidents, is prohibited from driving any commercial motor vehicle . . . for a period of 60 consecutive days." 57 Fed. Reg. at 59585 § 382.1107(a)(2)(i). The suspension for a driver who tested positive "three or more times in separate incidents" during a three year period was "120 consecutive days." 57 Fed. Reg. at 59585 § 382.1107(a)(2)(ii).

In the end, however, DOT decided to "not include[] any CDL [commercial driver's license] suspensions or other disqualifications . . . for a controlled substances violation" in

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administration rules as if they tested positive on the initial test." DOT, *Regulatory Guidance* § 382.605 Question 15. *See* U.S. Br. 20-21.

the form of a positive drug-test. 59 Fed. Reg. at 7493. Thus, when a driver tests positive, "[a]ll the rules require is [that the employee be] remov[ed] from safety-sensitive functions," 59 Fed. Reg. 7302, 7332 (1994), and that "[b]efore [such] an employee returns to performing safety-sensitive functions, the [rehabilitation] requirements of § 382.605 must be met," DOT, *Regulatory Guidance* § 382.605, Question 20.

It is worthy of note, in this regard, that the DOT regulations draw a sharp distinction between a driver who tests positive and a driver who is convicted of driving under the influence of drugs. The "[r]egulations . . . impose disqualifications and penalties for driving under the influence of controlled substances . . . [that] are intended to rid the highways of drivers . . . who pose a threat to the public." 57 Fed. Reg. at 59576. *See* 49 CFR §§ 383.51(b) & 391.15(c) (prescribing a one year suspension for a first DUI offense, a ten year suspension for a second DUI offense, and a life-time suspension for a third DUI offense).

2. In elaborating the Omnibus Testing Act drug testing regime, DOT gave close attention to two related questions concerning the retention in employment of a driver who has tested positive. The first concerns maintaining such a driver on the payroll while he or she completes the rehabilitation process prescribed by the regulations; the second concerns the driver's return to a safety-sensitive job after completing rehabilitation.

a. With regard to the first question, DOT has made it clear that "an employee who tests positive [may] be retained in a non-driving capacity" during the SAP process. DOT, *Regulatory Guidance* § 382.605, Question 20. Prior to completion of the SAP process, such an employee "may perform any duties for an employer that are not considered 'safety-sensitive functions.'" DOT, *Regulatory Guidance* § 382.501, Question 1. At the same time, DOT has determined that "employers who remove an employee from a

safety-sensitive function should not be obligated [by the regulations] to place that employee in another position or compensate the employee." 59 Fed. Reg. 7302, 7332. (1994).

While the regulations do not require an employer to retain a driver on the payroll during rehabilitation, DOT has counseled that "[t]he SAP process has the potential to be more complicated when the employee is not retained by the employer." DOT, *Regulatory Guidance* § 382.605, Question 5. And, DOT has, therefore, "encourage[d] those employers who can afford to provide rehabilitation to do so through established health insurance programs, since it helps their drivers, benefits morale, is often cost-effective and ultimately contributes to the success of both their business and their testing programs." 59 Fed. Reg. at 7502. *See* U.S. Br. 14 n.6.

Subject to that counsel, however, DOT decided to "*leave the specific conditions under which an employee is removed*, such as whether or not the employee is paid or moved to another non-safety-sensitive position, *to employer policies or collective bargaining*." 59 Fed. Reg. at 7332 (emphasis added).

b. The second, closely related question to which DOT has given careful consideration is whether "a driver [should] be provided with employment reinstatement rights at the completion of a rehabilitation program and a negative test for controlled substances." 53 Fed. Reg. at 47148.

When DOT took up the question of revising its drug testing regulations after the enactment of the 1991 Omnibus Testing Act, the Department began by reiterating the determination made in drafting the 1988 drug testing regulation that *whether to "require employers to provide or pay for rehabilitation or to hold a job open for an employee with or without salary . . . should be left for management/employee negotiations.*" 57 Fed. Reg. 59382, 59405 (1992) (emphasis added).[10]

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[10] DOT began where it had left off in 1988, based on the understanding that "it is the intent of Congress that [the] current controlled substances

The course of the 1988 rulemaking in this regard was as follows. The Department "proposed several alternatives for employee assistance programs and rehabilitation" that addressed the issue of reinstatement following rehabilitation. 53 Fed. Reg. at 47148. "Under the first three options, . . . the employer would have been *required* to hold the employee's position open while the employee underwent rehabilitation." *Id.* (emphasis added).[11]

In response to the 1988 DOT proposal, "there was a divergence of views on the criteria for providing rehabilitation and who should assume the costs of such a program." 53 Fed. Reg. at 47148. In particular, "[t]hose commenters representing motor carriers were in favor of *leaving the decision to provide rehabilitation and reemployment rights to management-labor negotiations.*" *Id.* (emphasis added).

While DOT "recognize[d] the significance of the arguments raised in defense of broad rehabilitation opportunities and job security for employees who use drugs," the Department "decided that motor carriers will not be required, by th[e] rule, to offer an opportunity for rehabilitation or to provide job security to drivers who fail a drug test." 53 Fed. Reg. at 47148. Rather, the Department determined that "*[i]ssues such as termination*" for a positive drug test "*are appropriately the subject of labor-management negotiations.*" *Id.* (emphasis added). The Department explained that this approach "provides the most flexibility to *labor and management* to determine the need for and shape of any rehabilitation program." *Id.* (emphasis added).

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regulations be incorporated into the regulations required to be issued under the Omnibus Act." 57 Fed. Reg. at 59567.

[11] While the DOT's proposal only required the employer to give an employee one chance for reinstatement after testing positive, the Department made clear that the employer was free to offer "more rehabilitation options than the minimums the FHWA proposes," stating that, "for example, an employer could voluntarily offer two chances at rehabilitation rather than one." 53 Fed. Reg. 22268, 22277 (1988).

In the 1992-94 rulemaking, as in 1988, "[c]onsiderable controversy was generated in the rule-making process as to *whether requirements should be imposed upon the carriers to provide* rehabilitation treatment and *reemployment rights*." W. Kenworthy, *Transportation Safety Law Practice Manual* ¶ 10.102(c), pp. 10-14.A.1-15 (1997)(emphasis added). Again, in this second round of rulemaking, as in 1988, the DOT concluded that *whether to "require employers to provide or pay for rehabilitation or to hold a job open for a driver with or without salary . . . should be left to management/driver negotiations*." 59 Fed. Reg. at 7502 (emphasis added).

c. Consistent with the decision to "leave the specific conditions under which an employee [who tests positive] is removed [from a safety sensitive position] . . . to . . . collective bargaining," 59 Fed. Reg. at 7332, the DOT regulations recognize that the employer's exercise of independent authority to impose additional sanctions for a positive drug test are "subject to any constraints on management discretion (*e.g.*, an agreement to arbitrate) that the employer has voluntarily assumed." U.S. Br. 13.

Indeed, the regulations expressly preserve the limits on management prerogative achieved through collective bargaining by stating that "nothing in this part shall be construed to affect . . . the rights of drivers" in this regard and that only "express[] provi[sions]" in the regulations can override such rights. 49 CFR § 382.111.[12] In this regard, § 382.111 of the regulations states:

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[12] To underscore the independence of any employer-imposed discipline, the regulations require that if an employer "supplie[s] to drivers . . . information on additional employer policies with respect to the use of . . . controlled substances, including any consequences for a driver found to have a specified . . . controlled substances level, . . . such additional policies or consequences must be clearly and obviously described as being based on independent authority" and *not* on the regulations. 49 CFR § 382.601(c).

> Except as expressly provided in this part, nothing in this part shall be construed to affect the authority of employers, or the rights of drivers, with respect to the use of alcohol, or the use of controlled substances, including authority and rights with respect to testing and rehabilitation.

Among the "rights with respect to testing and rehabilitation," 49 CFR § 382.111, which the regulation may *not* be "construed to affect," *id.*, are the "mechanisms in . . . agreement[s] through which employees may have an opportunity to challenge . . . proposed disciplinary actions resulting from [drug] testing" that Congress specifically "affirm[ed]" in passing the Omnibus Testing Act. S.Rep. No. 102-54, 102d Cong., 1st Sess. 8 (1991).

In sum, "DOT [has] chose[n] to entrust private parties with significant discretion to determine whether reinstatement is appropriate in particular cases." U.S. Br. 20. It follows, as the Brief for the United States observes, that as long as

> the regulatory prerequisites to reinstatement [are satisfied], and the decisionmaker chosen by the parties concludes that reinstatement . . . is appropriate, enforcement of the arbitral award could not plausibly be deemed inconsistent with any policy judgment reflected in the DOT regulations. To the contrary, a judicial decree setting the award aside would be inconsistent . . . with the regulatory balance struck by DOT . . . . [U.S. Br. 20.]

C. While not directly relevant to the merits of Eastern Coal's public policy claim, the Company's harsh attack on the substance of the arbitration award warrants a brief word in the form of a rejoinder outlining the basis for the award and the substantial employment sanctions and strict conditions on reinstatement imposed by the arbitrator.

The arbitrator's decision to reduce Smith's discharge to a three month suspension rests on three subsidiary findings: first, that Smith has "been an otherwise solid employee for a significant period of time," Pet. App. 27a; second, that "[f]rom April 1996 to July 1997, [Smith] appeared to be making a good faith effort to be rehabilitated," *id.*; and third, that the June 1997 positive test was a "one time lapse" caused by "a personal/family problem," *id.*, at 28a. Eastern Coal has not challenged these findings, nor could the Company have challenged them under this Court decision in *Misco*. *See Misco*, 484 U.S. at 44-45.

In framing his award, Arbitrator Barrett noted that "the unambiguous notice of the need to correct his behavior" provided by Arbitrator Ross' award had not completely resolved Smith's marijuana problem. Pet. App. 28a. Accordingly, Arbitrator Barrett designed a remedy intended to "assure that the company and union will not be required to use arbitration again for this greivant where drugs are involved." *Id.* Arbitrator Barrett attempted to provide this assurance by imposing substantially stricter penalties on Smith than had Arbitrator Ross and by imposing conditions on Smith's reemployment that incorporated and went beyond the conditions imposed by Arbitrator Ross. *Id.* at 29a.

The award imposes three penalties on Smith. First, Smith was suspended without pay from all employment—not just truck driving—for a period of more than three months. Pet. App. 29a. Beyond that Smith was required to pay a substantial fine in the form of reimbursing the Union and the Company for the costs of his two discharge arbitrations. *Id.* And, Smith was required to sign a letter of resignation that would become effective should he test positive a third time. *Id.*

By contrast, the penalties which DOT considered—but did not impose—would have suspended Smith for only 60 days, rather than the 98 days for which the arbitrator suspended

him, and would have provided for a 120-day suspension on a third positive test, rather than the unreviewable discharge provided for by the arbitrator. *Compare* 57 Fed. Reg. at 59576 Table III *with* Pet. App. 29a.

In addition to imposing these substantial penalties, the arbitrator conditioned Smith's reinstatement in a manner that insures full compliance with the DOT regulations.

By "reinstat[ing]" the prior arbitration award, Pet. App. 29a, which "required [Smith] to participate in a substance abuse program," *id.* at 25a, the arbitrator clearly intended that "counseling [would] result[] from th[e] award," *id.* at 29a. DOT has estimated that "the least time that it would take to complete a rehabilitation program would be 28 days." 53 Fed. Reg. at 47148. Smith was suspended for more than three times that long, a period more than adequate to complete any rehabilitation program that might have been prescribed within that time. *See* U.S. Br. 17 ("Depending on the SAP's evaluation, any required rehabilitation program might feasibly have been completed before the end of Smith's suspension.").[13]

It is very much to the point that the arbitrator does *not* specify into which position Smith should be placed upon reinstatement, only that he is to be "returned to work." Pet. App. 29a. Smith had worked for Eastern Coal for some seventeen years, often in non-driving positions, *id.* at 7a, and had an "excellent employment record," *id.* at 26a. Thus, even *if* an SAP determined that Smith needed to participate in a rehabilitation program, and even *if* he were unable to complete that program during his suspension, Eastern Coal could still have complied with the award by simply placing Smith in one of the many non-safety-sensitive positions

[13] As the Union demonstrated in post-judgment proceedings before the district court, Smith did in fact complete the SAP process before the reinstatement date set by the arbitrator. *See* Def. Mine Workers Combined Mem. App. B, Ex. 3 (Dkt. 29).

covered by the collective bargaining agreement. *See Misco*, 484 U.S. at 45.

The award also subjects Smith to random drug tests during his period of suspension, Pet. App. 29a, in addition to the return-to-duty test he would have to take before returning to his position as a truck driver, 49 CFR § 382.309(b). And, should Smith fail any of these tests—or any test during the next five years—he is subject to unreviewable discharge. Pet. App. 29a.

In sum, the substance of the arbitration award confirms the Omnibus Testing Act judgment that "the decision whether reinstatement is advisable in a particular case is appropriately left to private ordering." U.S. Br. 23.

II. THE LMRA § 301 PUBLIC POLICY EXCEPTION JUSTIFIES A COURT'S REFUSAL TO ENFORCE A LABOR ARBITRATION AWARD ONLY IF THE AWARD ITSELF, OR THE CONDUCT THE AWARD REQUIRES, VIOLATES POSITIVE LAW

In its most basic terms, the LMRA § 301 public policy exception as stated in *Misco* is that a court may "refus[e] to enforce an arbitrator's award under a collective-bargaining agreement because it is contrary to public policy" only where the award "violate[s] some explicit public policy that is well-defined and dominant, and is to be ascertained by reference to the laws and legal precedents," and thus "create[s] an[] explicit conflict with [those] laws and legal precedents." 484 U.S. at 42 & 43.

As we have noted, *Misco*—which like *W.R. Grace* concluded that there was *no* conflict between the award at issue and positive law—does not define or otherwise elaborate on the nature of the necessary "explicit conflict" between the award and positive law, except by example. We have, therefore, proceeded to this point on the lower courts'

premise that where a statutory "public policy militat[es] against the arbitrator's decision," Pet. App. 18a, there is an "explicit conflict" in *Misco* terms. And, we have shown there is no such conflict between the award here and the Omnibus Testing Act and the implementing DOT regulations. Simply stated, the regulations purposefully leave the discharge or retention of a driver who tests positive to private decisionmaking, either by the employer acting unilaterally or by the employer acting under an agreement reached through joint labor-management negotiations.

That direct response to Eastern Coal's "public policy" claim provides a showing that is more than sufficient to sustain the judgment of the court below. But we would be derelict if we did not state, and briefly explain, our position that the LMRA § 301 public policy exception should rest on a more limited and more certain "explicit conflict" requirement.

It is our contention that the proper LMRA § 301 public policy exception standard is the one the Court noted but found it unnecessary to address in *Misco*—that a labor arbitration award creates an "explicit conflict" with the relevant law and legal precedent justifying vacation of the award on public policy grounds only where "the award itself violates a statute, regulation or other manifestation of positive law or compels conduct by the employer that would violate such a law." 484 U.S. at 45 n.12.[14]

A. The *Misco* "public policy" exception—whatever its precise dimensions—is necessarily an LMRA § 301 rule.

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[14] *American Postal Workers v. United States Postal Service*, 789 F.2d 1, 8-9 (D.C. Cir. 1986); *E.I. DuPont de Nemours v. Grasselli Employees Ass'n*, 790 F.2d at 617-620 (Easterbrook, J., concurring). *See* Edwards, *Judicial Review of Labor Arbitration Awards: The Clash Between the Public Policy Exception and the Duty to Bargain*, 64 Chicago-Kent L. Rev. 3 (1988); Easterbrook, "Arbitration, Contract, and Public Policy," in *Arbitration 1991: The Changing Face of Arbitration in Theory and Practice*, Proceedings of the Forty-Fourth Annual Meeting, National Academy of Arbitrators 65-77 (1992).

Suits to vacate labor arbitration awards, like suits to enforce such awards, are "[s]uits for violation of contracts between an employer and a labor organization," arising under LMRA § 301(a), *see* Jt. App. 7 ¶ 1, and it is basic that "the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws." *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456 (1957).[15] *Misco* thus states one component of "an evolving federal common law grounded in national labor policy." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985), quoting *Bowen v. United States Postal Service*, 459 U.S. 212, 224-225 (1983).

In the development of the law under LMRA § 301, common law contract rules do, of course, provide a reference point that, "if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy." *Lincoln Mills*, 353 U.S. at 104. As a general matter, however, in determining the § 301 contract rules, the Court—out of recognition that "a collective-bargaining agreement 'is more than a contract.' "—has "not appl[ied] principles of ordinary contract law." *Bowen*, 459 U.S. at 224, quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).[16]

B. "In the common law of contracts, th[e public policy] doctrine has served as the foundation for occasional exercises of judicial power to abrogate private agreements." *Misco*, 484 U.S. at 42. Two aspects of federal labor policy call for closely circumscribing such "judicial power" where the

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[15] *See also Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962) ("Comprehensiveness is inherent in the process by which the law is to be formulated under the mandate of *Lincoln Mills*, requiring issues raised in suits of a kind covered by § 301 to be decided according to the precepts of federal labor policy.").

[16] *See also Lucas Flour*, 369 U.S. at 102 ("incompatible doctrines of [common] law must give way to principles of federal labor law").

"private agreements" in question are collective bargaining agreements that provide for the final and binding resolution of labor-management disputes by arbitration.

First, "the basic policy of national labor legislation [is] to promote the arbitral process as a substitute for economic warfare." *Lucas Flour*, 369 U.S. at 105. *See* 29 U.S.C. § 173(d) ("Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.").[17] And, it has long been recognized that this aim "can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566 (1960).

In cases arising under LMRA § 301, "the judiciary sits . . . to bring into operation an arbitration process, which substitutes for the older regime of industrial conflict." *Warrior & Gulf Co.*, 363 U.S. at 585. Thus, in deciding cases brought under § 301, the "[c]ourts are not to usurp those functions which collective-bargaining contracts have properly 'entrusted to the arbitration tribunal.' " *Hines v. Anchor Motor Freight*, 424 U.S. 554, 562-563 (1976), quoting *American Mfg. Co.*, 363 U.S. at 566.

Since the arbitration tribunal's primary function is to interpret and apply the collective bargaining agreement, the

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[17] *See also Buffalo Forge Co. v. Steelworkers*, 428 U.S. 397, 407 (1976) ("strong congressional preference for private dispute settlement mechanisms agreed upon by the parties"); *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 382 (1974) ("strong federal policy favoring arbitration of labor disputes"); *Drake Bakeries v. Bakery Workers*, 370 U.S. 254, 263 (1962) ("In passing § 301, Congress . . . was particularly interested in placing 'sanctions behind agreements to arbitrate grievance disputes.' "); *Lucas Flour*, 369 U.S. at 105 ("the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare").

most serious judicial usurpation is review of the arbitration award on the merits. "The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." *Steelworkers v. Enterprise Wheel Corp.*, 363 U.S. 593, 596 (1960).

Second, and closely related to the federal labor policy on arbitration, is "this Nation's longstanding labor policy of leaving to the chosen representatives of employers and employees the freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment." *California Brewers Ass'n v. Bryant*, 444 U.S. 598, 608 (1980). *See* 29 U.S.C. § 171(a) (declaring "the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees" to be "the policy of the United States").[18]

Given the strength of the free collective bargaining policy, this Court has cautioned that "[i]t does not behoove a court to second-guess either th[e collective bargaining] process or its products." *California Brewers Ass'n*, 444 U.S. at 608. And, in terms that support our position on the nature and dimension of the proper LMRA § 301 public policy exception, the Court has held that "when neither the collective-bargaining process nor its end product violates any command of Congress, a federal court has no authority to modify the substantive terms of a collective-bargaining contract." *UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562, 576 (1982). *See also Carbon Fuel Co. v. Mine Workers*, 444 U.S. 212,

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[18] *See also Trans World Airlines v. Hardison*, 432 U.S. 63, 79 (1977) ("Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy . . . ."); *Lucas Flour*, 369 U.S. at 104 ("The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace.").

219 (1980) ("If the parties' agreement specifically resolves a particular issue, the courts cannot substitute a different resolution.").

C. An open-ended public policy standard as advocated by Eastern Coal, Pet. Br. 22, invites standardless review of arbitration awards on their merits in a manner that rewrites the parties' agreement, and thus cuts too deeply against basic federal labor policies to be countenanced.

The collective bargaining agreement between Eastern Coal and the Union "specifically resolves [the] particular issue" of the employer's authority to discharge covered employees, *Carbon Fuel*, 444 U.S. at 219, and does so by making full use of arbitration as a "substitute for economic warfare," *Lucas Flour*, 369 U.S. at 105. That agreement provides that such discipline must be for "just cause" and that the final determination of whether there is just cause for a discharge shall be made by the arbitrator. The arbitrator here—after considering all of the relevant factors, including the DOT regulations—concluded that Smith's June 1997 positive drug test did not provide "just cause" to discharge Smith.

In bringing this case, Eastern Coal put its public policy challenge to the arbitration award in the following terms: "Because the Barrett Award clearly violates this public policy [against performance of safety-sensitive jobs while under the influence of illegal drugs], it does not draw its essence from the Wage Agreement and it must be vacated." Jt. App. 12. In other words, Eastern Coal argues that the public policy of the Omnibus Testing Act and the DOT regulations provide "just cause" as a matter of law to discharge any employee who tests positive and that the award here, by not treating a positive test as "just cause" *per se*, "does not draw its essence from the Wage Agreement and . . . must be vacated."

That is most certainly a request for a court to substitute its construction of the agreement for the arbitrator's. And, it is

not made any less so by the fact that the primary basis on which Eastern Coal claims "just cause" to discharge Smith is the DOT regulations, for the regulations are among the "many sources" to which the arbitrator may—and in this case did—"look for guidance" in resolving the dispute. *Enterprise Wheel*, 363 U.S. at 597.

What is more, Eastern Coal's request is wholly without a legitimate basis. The Company does not even pretend that the Omnibus Testing Act and the implementing DOT regulations state a policy in favor of discharging employees who test positive much less a policy sanctioning a unilateral employer discharge prerogative that is unreviewable under collectively bargained standards and through collectively bargained procedures.

What Eastern Coal's position comes down to is that the acknowledged general policy of the drug testing regime—protecting the public against the performance of safety sensitive functions by employees who are under the influence of drugs—entails an unstated subsidiary policy providing employers an unchallengable, absolute prerogative to discharge employees who test positive.

There is no iron logic, however, that requires the deduction of the employer-prerogative policy Eastern Coal asserts from the Act's general policy. The DOT rulemaking proceedings make that plain. As DOT recognized by leaving the matter to private decisionmaking, there is no single policy on employer discipline of employees who test positive that follows ineluctably from the general protective policies of the Act. Thus, what Eastern Coal seeks is not only judicial reversal of the arbitrator's award on the merits but reversal on a ground that is inadequate in its own terms.

It is equally to the point that, by challenging the arbitrator's "just cause" determination on public policy grounds, Eastern Coal aims to modify the substantive terms of the parties'

collective bargaining agreement insofar as that agreement subjects all employer discharge determinations to "just cause" review through the negotiated "Discharge Procedure." Jt. App. 30. The Company could have—but has not—bargained for an unreviewable authority to discharge an employer based on a positive drug test. *See* Bureau of Labor Statistics, *Alcohol and Drug Abuse Provisions in Major Collective Bargaining Agreements* 7 (Oct. 1990). Many other employers have done just that. For example, the current National Master Freight Agreement provides that, on a first positive drug test, an employee will be suspended for ten days and that, on a second positive test, "the employee shall be subject to discharge." National Master Freight Agreement, Uniform Testing Procedure § J(4), *available at* U.S. Dept. of Labor, Bureau of Labor Statistics, *Collective Bargaining Files* K nos. 5201 & 5202. *See also Wilder v. G.L. Bus Lines*, 2000 U.S. Dist. LEXIS 9524, *27-*28 (S.D.N.Y. 2000) (collective bargaining agreement adopted "the strict terms of the GL Bus Line's 'zero tolerance drug policy' ").

As this Court has recognized, the "legislative effort to promote the achievement of industrial peace through encouragement and refinement of the collective bargaining process . . . would be purposeless unless both parties to a collective bargaining agreement could have reasonable assurance that the contract they had negotiated would be honored." *Dowd Box Co. v. Courtney*, 368 U.S. 502, 509 (1962). Eastern Coal's attempt to use the public policy exception to acquire an employer prerogative plainly denied in the collective bargaining agreement is thus fundamentally inconsistent with the premises of the free collective bargaining system.

D. We recognize that Eastern Coal argues that "the policy of the labor laws favoring collective bargaining, arbitration of labor disputes, and limited judicial review of arbitration decisions" have "no place" when "an arbitration award

threatens public safety." Pet. Br. 24. But, such a "public safety" exception would cut a wide swath through the federal labor policy, as "the issue of safety in the workplace is a commonplace issue for arbitrators to consider in discharge cases." *Misco*, 484 U.S. at 45 n. 11. And, such an exception would run directly contrary to the determination of Congress that "the advancement of the general welfare, health, and safety of the Nation . . . can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining." 29 U.S.C. § 171(a).

Not surprisingly then, when this argument for a safety exception was made in *Gateway Coal*, this Court expressly rejected it. In that case, the Third Circuit, had carved out a safety exception to the rules favoring labor arbitration on the theory that "[m]en are not wont to submit matters of life or death to arbitration and no enlightened society encourages, much less requires, them to do so." *Gateway Coal Co. v. United Mine Workers*, 466 F.2d 1157, 1160 (3d Cir.1972). In reversing the Third Circuit's decision in this Court rejected the notion "that safety disputes should be treated as *sui generis*." 414 U.S. at 376. The Court held that the federal policies favoring arbitration and free collective bargaining "are as applicable to labor disputes touching . . . safety . . . as to other varieties of disagreement." *Id.* at 379. In this regard, the Court noted that "[c]ertainly industrial strife may as easily result from unresolved controversies on safety matters as from those on other subjects, with the same unhappy consequences of lost pay, curtailed production, and economic instability." *Id.* And, the Court specifically found that "the special expertise of the labor arbitrator, with his knowledge of the common law of the shop, is as important to the one case as to the other." *Id.*

The Omnibus Testing Act and the DOT regulations—by "leaving to private ordering the decision whether reinstatement is appropriate in a particular case," U.S. Br. 18

—follow the path laid out by this Court in *Gateway Coal*. The public safety is protected by the DOT regulations, which "describe in detail the conditions that an employee who tests positive must satisfy inorder to be eligible to resume safety-sensitive duties." *Id.* And, of course, an arbitration award that ordered reinstatement in violation of the DOT regulations would be unenforceable. *See Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83 (1982). But, where, as here, the arbitration award contemplates that the reinstated "employee [will] satisf[y]] the regulatory prerequisites to resumption of safety-sensitive duties," the award cannot be set aside on the grounds that the DOT's "rules are insufficient to protect the public safety." U.S. Br. 19.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

GRANT CRANDALL
JUDITH RIVLIN
UNITED MINE WORKERS
OF AMERICA
8315 Lee Highway
Fairfax, VA 22031-2215

CHARLES F. DONNELLY
DONNELLY & CARBONE
No. 8 Capitol Street
Suite 300
Charleston, WV 25321

LAURENCE GOLD
BREDHOFF & KAISER
805 15th Street, N.W.
Washington, DC 20005

JOHN R. MOONEY *
RICHARD W. GIBSON
DANIEL E. KORNFELD
MOONEY, GREEN, GLEASON, BAKER
GIBSON, & SAINDON, P.C.
1920 L St., N.W., Suite 400
Washington, DC 20036
(202) 783-0010

JONATHAN P. HIATT
JAMES B. COPPESS
AFL-CIO
815 16th Street, N.W.
Washington, DC 20006

* Counsel of Record

(13)

No. 99-1038

AUG 2 9 2000

IN THE

Supreme Court of the United States

EASTERN ASSOCIATED COAL CORPORATION,
Petitioner,

v.

UNITED MINE WORKERS OF AMERICA, DISTRICT 17;
LOCAL 1503, UNITED MINE WORKERS OF AMERICA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

RONALD E. MEISBURG
HEENAN, ALTHEN & ROLES
1110 Vermont Avenue, N.W.
Suite 400
Washington, D.C. 20005
(202) 887-0800

ANNA M. DAILEY
DONNA C. KELLY
HEENAN, ALTHEN & ROLES
1380 One Valley Square
P.O. Box 2549
Charleston, WV 25329
(304) 342-8960

JOHN G. ROBERTS, JR.*
DAVID G. LEITCH
H. CHRISTOPHER BARTOLOMUCCI
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

* Counsel of Record

Counsel for Petitioner

27pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION AND SUMMARY	2
ARGUMENT	5
I. THE FACT THAT THE DOT REGULATIONS LEAVE TO PRIVATE CONTRACT THE DECISION WHETHER AN EMPLOYEE IN A SAFETY-SENSITIVE POSITION WHO TESTS POSITIVE FOR ILLEGAL DRUG USE SHALL BE REINSTATED SIMPLY POSES—DOES NOT ANSWER—THE QUESTION PRESENTED	5
II. THE POSITION OF THE UNION AND THE SOLICITOR GENERAL THAT THE REINSTATEMENT AWARD MUST BE ENFORCED SIMPLY BECAUSE IT IS NOT ILLEGAL IS CONTRARY TO THE ESTABLISHED UNDERSTANDING OF THE PUBLIC POLICY DOCTRINE	11
III. APPLYING THE PUBLIC POLICY EXCEPTION TO ARBITRAL AWARDS IS FULLY CONSISTENT WITH FEDERAL LABOR LAW	13
CONCLUSION	20

TABLE OF AUTHORITIES

Page

Cases:

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) 16
Allis-Chalmers Corp. v. *Lueck*, 471 U.S. 202 (1985) 17, 18
Bowen v. *United States Postal Serv.*, 459 U.S. 212 (1983) 14
E.I. DuPont de Nemours & Co. v. *Grasselli Employees Indep. Ass'n*, 790 F.2d 611 (7th Cir.), *cert. denied*, 479 U.S. 853 (1986) 18-19
Exxon Corp. v. *Esso Workers' Union, Inc.*, 118 F.3d 841 (1st Cir. 1997) 6
Gateway Coal Co. v. *United Mine Workers*, 414 U.S. 368 (1974) 15
Gulf Coast Indus. Workers Union v. *Exxon Co., U.S.A.*, 991 F.2d 244 (5th Cir.), *cert. denied*, 510 U.S. 965 (1993) 18
Hurd v. *Hodge*, 334 U.S. 24 (1948) 11, 14
Iowa Elec. Light & Power Co. v. *Local Union 204, IBEW*, 834 F.2d 1424 (8th Cir. 1987) 18
The Kensington, 183 U.S. 263 (1902) 12
Livadas v. *Bradshaw*, 512 U.S. 107 (1994) 18
Local 174 v. *Lucas Flour Co.*, 369 U.S. 95 (1962) 14
Local No. P-1236 v. *Jones Dairy Farm*, 680 F.2d 1142 (7th Cir. 1982) 12
Marshall v. *Baltimore & Ohio R.R.*, 57 U.S. 314 (1853) 12
Town of Newton v. *Rumery*, 480 U.S. 386 (1987) 11
Trist v. *Child*, 88 U.S. 441 (1874) 3
United Mine Workers of Am. Health & Retirement Funds v. *Robinson*, 455 U.S. 562 (1982) 12
United Paperworkers Int'l Union v. *Misco, Inc.*, 484 U.S. 29 (1987) ..... *passim*
United Steelworkers v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) 15
Vaca v. *Sipes*, 386 U.S. 171 (1967) 14

TABLE OF AUTHORITIES—Continued

	Page
W.R. Grace & Co. v. *Local Union 759, Int'l Union of Rubberworkers*, 461 U.S. 757 (1983)	*passim*
Wright v. *Universal Maritime Serv. Corp.*, 525 U.S. 70 (1998)	16
Statutory Provisions:	
42 U.S.C. § 1983	11
Labor Management Relations Act of 1947, 29 U.S.C. § 173(d)	15, 16-17
Regulations and Executive Materials:	
49 C.F.R. § 382.605	5
49 C.F.R. § 382.605(b)	10
49 C.F.R. § 382.605(c)(2)(i)	10
59 Fed. Reg. 7484 *et seq.* (Feb. 15, 1994)	6, 7, 8
Other:	
National Ass'n of Alcoholism & Drug Abuse Counselors, Ethical Standards of Alcoholism & Drug Abuse Counselors, Principle 7(c) (1995)	10
Restatement (Second) of Contracts § 179, comment b (1981)	5

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REPLY BRIEF FOR PETITIONER

We began our opening brief by explaining that there is a well-established rule that courts will not enforce a contract contrary to public policy, and that this rule applies to collective bargaining agreements and arbitration awards entered pursuant to them. *See* Pet. Br. 11-27. Neither the Union nor the Solicitor General takes issue with either showing. We went on to demonstrate that there is a well-defined and dominant public policy against illegal drug use by those in certain safety-sensitive positions, grounded in part in the Testing Act and DOT regulations. *See id.* at 29-38. Once again, neither the Union nor the Solicitor General challenges that showing.

Instead, both the Union and the Solicitor General put all their eggs in one basket: the contention that the public policy exception is limited in this case, so that courts asked to enforce arbitration awards reinstating confirmed drug users to safety-sensitive positions may only check for compliance with the minimum requirements of the DOT regulations. The upshot of this position is, of course, that there is no public policy exception at all in such cases—arbitration awards that violate the DOT regulations are unenforceable on that ground, not because of the public policy exception. Neither the Union nor the Solicitor General, however, has carried the burden of justifying such a departure from the time-tested rule.

INTRODUCTION AND SUMMARY

The Union and the Solicitor General labor mightily in their submissions to establish what turns out to be merely the predicate for the question presented—namely, that the Testing Act and DOT regulations "leav[e] to private ordering" the decision whether a commercial driver who tests positive for illegal drugs should be reinstated to his safety-sensitive position. SG Br. 15; UMWA Br. 14. Since the earliest days of the common law, however, whenever private ordering has taken the form of a contractual agreement, and the courts have been asked to enforce that agreement, the courts have had the authority to decline to do so on the ground that the agreement contravenes public policy. That is so because "the public's interests in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements." *United Paperworkers Int'l Union* v. *Misco, Inc.*, 484 U.S. 29, 42 (1987).

What neither the Union nor the Solicitor General even attempts to explain is why that principle "of universal application," *Trist* v. *Child*, 88 U.S. 441, 448 (1874), is somehow inapplicable to this particular realm of private ordering. Certainly nothing in the Testing Act or DOT regulations remotely suggests that in leaving the question of reinstatement to be decided by contract, Congress or the Executive meant to repeal the established common law rules—including the public policy exception—that govern all other contractual arrangements. The very fact that the regulations accord such a prominent role to private contract makes it particularly important that the "safety valve" of the public policy exception remain available, so that when courts are called upon to enforce reinstatement awards they do not lend their authority to awards posing a serious threat to public safety.

The argument of the Union and the Solicitor General reduces to nothing more than the minority position on the question reserved in *Misco*, 484 U.S. at 45 n.12—that courts applying the public policy exception to arbitration awards should be restricted to asking whether the award itself is illegal or requires unlawful conduct. According to the Union and the Solicitor General, the Act and regulations adopt an "anything goes" approach with respect to reinstating drug users to safety-sensitive positions, once the minimum requirements in the regulations have been met. Under their approach, *nothing* the parties may agree to (or which an arbitrator may award) can possibly be contrary to the acknowledged public policy against illegal drug use by those occupying safety-sensitive jobs, and the courts must enforce *any* agreement (or arbitration award) without regard to its impact on third parties, public safety, or the testing program mandated by the Act. As we explained in our opening brief, however, the public policy exception has never been limited

to illegal agreements or arbitration awards that are themselves illegal. *See* Pet. Br. 14-19 (citing cases, Restatement, and commentators). Such a restriction would do away with the exception altogether.

Nor, contrary to the Union's contention, is there any basis for concluding that the public policy exception should not apply with its ordinary scope to collective bargaining agreements or arbitration awards entered pursuant to them. The normal rule of deference to arbitrators does not apply when the issue is the rights and interests of third parties who have not agreed to arbitration, and the question to be decided is one of public policy rather than the interpretation of a collective bargaining agreement. In any event, courts applying the public policy exception do not second-guess the arbitrator's factual findings, but only ask whether in light of the facts as found enforcement of the award would violate public policy. That question "is ultimately one for resolution by the courts." *W.R. Grace & Co.* v. *Local Union 759, Int'l Union of Rubberworkers*, 461 U.S. 757, 766 (1983).

For hundreds of years, courts asked to enforce private agreements have understood themselves to be authorized —indeed, duty-bound—to pause and consider whether enforcement would violate public policy by, for example, threatening the well-being of third parties not privy to the agreement. What would be "radical" (SG Br. 30) is to accept the Union's and the Solicitor General's invitation to turn a blind eye to the direct threat to public safety posed by enforcement of this award, and to conclude that such awards are immune from the public policy exception applicable as a matter of course to all other contracts.

ARGUMENT

I. THE FACT THAT THE DOT REGULATIONS LEAVE TO PRIVATE CONTRACT THE DECISION WHETHER AN EMPLOYEE IN A SAFETY-SENSITIVE POSITION WHO TESTS POSITIVE FOR ILLEGAL DRUG USE SHALL BE REINSTATED SIMPLY POSES—DOES NOT ANSWER—THE QUESTION PRESENTED.

The Union and the Government contend that the courts are powerless to consider whether an arbitration award ordering a reinstatement not prohibited by the regulations may violate public policy. This is so, we are told, because the regulations *permit* reinstatement in certain circumstances—specified in 49 C.F.R. § 382.605—and leave the question of reinstatement "with the employer * * *, subject to any constraints on management discretion * * * that the employer has voluntarily assumed." SG Br. 13. *See* UMWA Br. 22-23. But while the regulations applicable here certainly establish the *minimum* process that must be followed prior to any reinstatement, there has been no showing that this minimum has "entirely occupied the field" to the exclusion of the public policy doctrine. Restatement (Second) of Contracts § 179, comment b (1981). The minimum requirements expressly do not occupy the field to the exclusion of private agreements; there is no reason to suppose they do so to the exclusion of an established common law doctrine that goes hand in hand with all such agreements.[1]

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[1] The Union seeks to advance its argument by suggesting that the public policy on which we rely is drawn only from the Testing Act and the DOT regulations. *See* UMWA Br. 9. In fact, as we explained, the well-defined and dominant public policy against illegal drug use by those in safety-sensitive positions is grounded in " 'a solid phalanx of positive law,' " including but not limited to the Testing Act and the regulations issued under it. Pet. Br. 31

On the contrary, the very most that the Union and the Government can offer is that the Testing Act and DOT regulations generally leave the question of reinstatement to "private ordering"—except where the employee fails to go through the evaluation and rehabilitation process and reinstatement is therefore barred. We agree. When it promulgated the pertinent regulations, the Federal Highway Administration made clear that compliance with that process "will not guarantee a right of reemployment," and that the employer could impose additional consequences "based on the employer's authority *independent of these rules*," so long as such "additional policies [are] clearly identified as based on the *employer's independent authority*." 59 Fed. Reg. 7484, 7502-03 (Feb. 15, 1994) (emphases added). There is no reason to conclude, however, that such independent authority is not subject to generally applicable legal principles—including, where contractual arrangements are at issue, the doctrine that courts will not enforce contracts contrary to public policy.[2]

(quoting *Exxon Corp.* v. *Esso Workers' Union, Inc.*, 118 F.3d 841, 849 (1st Cir. 1997)). *See* Pet. Br. 30-38 (reviewing statutes, regulations, and precedents). The Testing Act and the regulations are "designed to promote the public policy against performance of safety-sensitive tasks by persons who use drugs," *Esso Workers' Union*, 118 F.3d at 848, but do not purport to and do not exhaust the bounds of that policy.

[2] The Solicitor General misses the point in viewing our argument as being "that if employers are permitted to impose sanctions for drug use above and beyond those mandated by the regulations, then federal courts must be free to do so as well." SG Br. 19 (citing Pet. Br. 46-47). What we actually said was quite different: "While employers and employees * * * remain free to agree by contract on both the process for addressing violations of the drug policy and on sanctions for those violations, any such agree-

There are, to be sure, references in the regulatory record indicating that an employer's independent authority to impose additional consequences for failed drug tests will sometimes be constrained by collective bargaining. *See*, *e.g.*, 59 Fed. Reg. at 7332. But nowhere is there the slightest hint that the results of such bargaining are somehow sacrosanct, elevated to a position above that occupied by all other contracts, even in the age of *Lochner*, *see* Pet. Br. 13 n.4, such that the public policy doctrine does not apply. Indeed, this Court has already determined that "[a]s with any contract, * * * a court may not enforce a collective-bargaining agreement that is contrary to public policy." *W.R. Grace*, 461 U.S. at 766. Nothing in the administrative record of the DOT regulations purports to displace this settled rule.[3]

Not only does the administrative record fail to provide any support for the view of the Union and the Solicitor General that the regulations somehow displace the centuries-old public policy doctrine, but such a conclusion would defy

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ment—like all other contractual arrangements—remains subject to the public policy doctrine, applied by the courts. Nothing in the Act or regulations suggests otherwise." Pet. Br. 47. The Solicitor General has no response to *that* contention.

[3] The Academy of Arbitrators argues that the public policy exception should not preclude judicial enforcement of any arbitration award ordering action that an employer could take on its own. *See* Academy Br. 4. This standard ignores the fact that the public policy exception is a doctrine of contract law and is implicated only when the courts are called upon to enforce a contract. *See* Pet. Br. 12-13. It is not a free-standing cause of action applicable to unilateral conduct. The employer's unilateral conduct in this regard is, in any event, constrained by the same considerations that inform the public policy exception, expressed in potential tort liability for the conduct of a reinstated driver. *See* Pet. App. 9a-10a; Brief Amicus Curiae of ExxonMobil Corporation 7.

common sense. As we have explained, the public policy doctrine has always been applied with an eye toward public safety. *See* Pet. Br. 30 n.15. It would be particularly odd to conclude that the doctrine has been displaced—*sub silentio*, no less—in a context where public safety is so directly implicated and was the very reason for the Testing Act in the first place. *See* SG Br. 2-3. And it would be even odder to conclude that the doctrine was displaced solely by a decision to leave the issue to private contract—a decision that typically would trigger, not preclude, application of this common law contract doctrine. If the reinstatement question is to be left to "private ordering," it is especially important that the public policy doctrine remain in place as a safety valve to protect those interests not otherwise accounted for yet directly affected by the reinstatement decision. *See Misco*, 484 U.S. at 42.

That the DOT regulations do not occupy the field to the exclusion of the public policy exception is true both as a general matter and in the particular case of repeat offenders. While the Union and the Solicitor General suggest that the failure to adopt a proposed regulation which would have imposed a period of suspension for second-time offenders somehow displaces the public policy doctrine on the reinstatement question, *see* UMWA Br. 18-19; SG Br. 5, 10, 20-21, there is no basis for attributing such an effect to DOT's *failure* to act. Indeed, the decision not to adopt the suspension proposal is wholly unexplained in the administrative record. *See* 59 Fed. Reg. at 7493 (simply noting that "[t]he FHWA has not included any CDL suspensions or other disqualifications [in] the final rule"). The failure to adopt a one-size-fits-all rule applicable in every case of a recidivist offender, along with the decision to leave the issue of reinstatement to private contract, hardly evinces an unstated intent to bar application of the public policy doctrine, a doc-

trine applicable as a matter of course to all contracts on a case-by-case basis as a safety valve to guard against egregious outcomes from the private ordering process. *See* Pet. Br. 39 n.25, 47.[4]

The Solicitor General's representation that DOT decided to entrust decisions regarding repeat offenders to "the sound judgment of arbitrators," SG Br. 10, is fanciful at best; the administrative record contains no mention of arbitrators. Furthermore, as explained below, labor arbitrators lack both the expertise and the authority to apply public policy. *See infra* at 15-16.

Nor can public safety reasonably be left in the hands of the substance abuse professional ("SAP") selected to counsel a

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[4] The Solicitor General suggests that because DOT regulations disqualify for 60 days a driver twice convicted of a serious traffic violation within a three-year period, courts have no choice but to enforce an award reinstating a driver who tests positive for illegal drugs twice within 14 months. *See* SG Br. 21-22 n.10. This apples-and-oranges comparison ignores a number of considerations, including that a recidivist drug offender has already been through a rehabilitation program, which proved unsuccessful in preventing renewed use, and that reinstatement in such circumstances seriously undermines the deterrent effect of the testing program. *See* Pet. Br. 40-44. In addition, it is important to recognize that the position of the Solicitor General and the Union is that courts must enforce awards reinstating drivers who test positive a second, fifth, or even twentieth time, and that in *no case* may a court decline to do so on public policy grounds. If the Court agrees with us that this extreme position is untenable, the only remaining question is the proper application of the public policy exception on the particular facts of this case. The Union and the Solicitor General have not rebutted our showing in that regard (Pet. Br. 38-44), having chosen instead to rest on the contention that courts may not undertake the public policy inquiry at all.

driver who tests positive. First, nothing in the regulations mandates that a SAP consider public safety in creating a rehabilitation program. *See* 49 C.F.R. § 382.605(b). Second, the SAP's professional obligations run to the driver, not the public; what may be best for the driver may not be best from the point of view of public safety. *See* National Ass'n of Alcoholism & Drug Abuse Counselors, Ethical Standards of Alcoholism & Drug Abuse Counselors, Principle 7(c) (1995) ("The NAADAC member shall hold the welfare of the client paramount when making any decisions or recommendations concerning referral, treatment procedures or termination of treatment."). Finally, the SAP must simply confirm that the driver "has properly followed any [prescribed] rehabilitation program"—not that the program was (or was likely to be) successful, that the driver is unlikely to use drugs again, or even that it is safe for him to return to a position in which such use might imperil others. 49 C.F.R. § 382.605(c)(2)(i). Such a minimal certification is little comfort from the perspective of public safety in a case such as this, when one thing known for certain is that "properly follow[ing]" a prior rehabilitation program did not work. *See* Brief Amicus Curiae of the Institute for a Drug-Free Workplace 18 ("those with a history of substance abuse pose a *much* greater risk of relapse and its attendant risks than those without such a history") (emphasis in original).

In sum, in arguing at length that the issue of reinstatement is largely unaddressed by the Testing Act and its regulations but is instead left to private ordering, the Union and the Solicitor General do no more than set up the question presented in this case—under what circumstances may courts refuse to enforce private contractual arrangements, including, as here, collective bargaining agreements and the results of arbitration under those agreements—on the ground that they are "contrary to public policy."

II. THE POSITION OF THE UNION AND THE SOLICITOR GENERAL THAT THE REINSTATEMENT AWARD MUST BE ENFORCED SIMPLY BECAUSE IT IS NOT ILLEGAL IS CONTRARY TO THE ESTABLISHED UNDERSTANDING OF THE PUBLIC POLICY DOCTRINE.

Neither the Union nor the Solicitor General, then, show any intent in the Act or regulations to displace the public policy exception generally applicable whenever courts are asked to enforce private agreements; the most they show is that the regulations do not prohibit the reinstatement order at issue here. In other words, the Union and the Solicitor General have simply adopted the narrower of the two possible answers to the question left open in *Misco*: whether "a court may refuse to enforce an award on public policy grounds only when the award itself violates a statute, regulation, or other manifestation of positive law, or compels conduct by the employer that would violate such a law." 484 U.S. at 45 n.12. The Union explicitly takes this position (UMWA Br. 27), while the Solicitor General does so implicitly.

As shown in our opening brief, this Court's cases have not limited the public policy doctrine to violations of positive law. *See* Pet. Br. 14-16. Indeed, in both *W.R. Grace*, 461 U.S. at 766, and *Misco*, 484 U.S. at 42, this Court prominently cited with approval *Hurd* v. *Hodge*, 334 U.S. 24 (1948), in which the Court refused to enforce a restrictive covenant that violated no constitutional or statutory provision but clearly did violate public policy. *See also Town of Newton* v. *Rumery*, 480 U.S. 386, 392-396 (1987) (considering whether release-dismissal agreements violate public policy even though 42 U.S.C. § 1983 is silent on the issue).

And even well before such modern cases, the Court had squarely rejected the notion that a contractual provision cannot be held contrary to public policy where "there is no

statute expressly prohibiting such contracts." *The Kensington*, 183 U.S. 263, 270 (1902). Thus, the longstanding rule has been that a court "will not lend its aid to enforce a contract to do an act that is illegal; *or* which is inconsistent with * * * public policy." *Marshall* v. *Baltimore & Ohio R.R.*, 57 U.S. 314, 334 (1853) (emphasis added).[5] The Restatement and leading commentators agree. *See* Pet. Br. 16-17. Tellingly, neither the Union nor the Solicitor General even attempts to respond to our showing on this point.

Their position would leave no room for cases like *Local No. P-1236* v. *Jones Dairy Farm*, 680 F.2d 1142 (7th Cir. 1982). There, a meat processor adopted a rule prohibiting its employees from reporting unsanitary conditions directly to Department of Agriculture inspectors rather than to company management. An arbitrator upheld the rule, but the Seventh Circuit accepted the union's argument that the rule violated "clearly defined" public policy, *id.* at 1145, citing the overarching purposes of the Meat Inspection Act, even though no specific provision of the Act made the rule illegal.[6]

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[5] *United Mine Workers of America Health & Retirement Funds* v. *Robinson*, 455 U.S. 562 (1982), cited by the Union (UMWA Br. 30), is not to the contrary. That case involved a claim that a provision of a collective bargaining agreement violated the Labor Management Relations Act ("LMRA") itself, not public policy, and, in any event, the Court recognized that such provisions "are entitled to * * * respect" only so long as they "do not violate federal law *or policy*." 455 U.S. at 575 (emphasis added).

[6] The Academy attempts to distinguish *Jones Dairy Farm* on the ground that the issue there was not "the arbitrator's decision on the 'just cause' of an employer's discipline" but rather the validity of "a contract rule" (Academy Br. 11), but that is not a principled basis for distinction. Indeed, as the Academy itself points out, when an arbitrator resolves a labor-management dispute pursuant to a written agreement calling for arbitration, "it is just as if the

If the *Misco* question were answered as the Union would have it, there would no longer be a public policy doctrine. Instead, the role of courts would be reduced to asking whether an arbitration award violates an express statutory or regulatory provision. A court would be obligated to lend its imprimatur to an arbitrator's decision and enforce the award no matter how egregious a threat to public safety the award may pose.

That is not and should not be the law. Because the courts below thought otherwise, this Court should at the least remand the case to afford the lower courts the opportunity to apply the public policy doctrine as correctly understood. *See* Pet. Br. 28.

III. APPLYING THE PUBLIC POLICY EXCEPTION TO ARBITRAL AWARDS IS FULLY CONSISTENT WITH FEDERAL LABOR LAW.

The Union insists that for a court to do more than ask whether an arbitration award is illegal would be inconsistent with federal labor law. *See* UMWA Br. 26-31. In this, the Union is quite wrong.

As an initial matter, the Union misconceives the source of the public policy doctrine. The Union suggests the doctrine comes from Section 301 of the LMRA, and thus calls it "the LMRA § 301 public policy exception." UMWA Br. 27. In fact, however, the source of the public policy doctrine is the common law of contracts. As the *Misco* Court explained: "A court's refusal to enforce an arbitrator's award under a collective-bargaining agreement because it is contrary to public policy *is a specific application of the more general*

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employer and the union had stipulated in so many words that this was the prescribed remedy under the circumstances." *Id.* at 9. The outcome of the arbitration is the "contract rule."

doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy." 484 U.S. at 42 (emphasis added). And in *W.R. Grace*, the Court said that "*[a]s with any contract*, * * * a court may not enforce a collective-bargaining agreement that is contrary to public policy." 461 U.S. at 766 (emphasis added). Both of the quoted statements, moreover, were followed by a citation to *Hurd* v. *Hodge*, *supra*, which involved neither labor law nor arbitration. Thus, the public policy doctrine is properly understood as a common law rule applicable to all contracts, including collective bargaining agreements.[7]

Contrary to the Union's contention, judicial review of labor arbitration awards for violations of public policy is not inconsistent with federal labor law. We agree that the labor laws require a court to refrain from second-guessing the

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[7] The Union distorts statements in *Bowen* v. *United States Postal Service*, 459 U.S. 212 (1983), and *Local 174* v. *Lucas Flour Co.*, 369 U.S. 95 (1962), in arguing that such common law doctrines do not apply to suits under Section 301. In *Lucas Flour*, the Court said that "incompatible doctrines of *local* law must give way to principles of federal labor law," *id.* at 102 (emphasis added), not, as the Union says, "incompatible doctrines of [common] law." UMWA Br. 28 n.16 (brackets by the Union). *Lucas Flour* thus merely stands for the unremarkable proposition that federal labor law preempts inconsistent state law. And *Bowen* did not say that the Court has "not appl[ied] principles of ordinary contract law" in Section 301 cases generally (UMWA Br. 28), but rather that "*Vaca* [v. *Sipes*, 386 U.S. 171 (1967)] did not apply principles of ordinary contract law" to the question of "apportionment of damages caused by the employer's breach of the collective-bargaining agreement and the union's breach of its duty of fair representation." *Bowen*, 459 U.S. at 224. The fact that the *Vaca* Court elected not to apply contract law to that very specific labor law issue hardly establishes that the common law of contracts is to be routinely ignored in Section 301 cases.

decision of a labor arbitrator in the ordinary case, *see* Pet. Br. 24, but the grounds for such judicial deference are lacking in a case like this—for three reasons.

First, it is one thing for a court to defer to the decision of an arbitrator where all the parties whose interests are at stake have consented to the arbitration process. But it is quite another for a court to defer to an arbitral decision that affects third parties who never consented to be subject to an arbitrator's unreviewable decree. *See id.* at 24-25. The LMRA identifies arbitration as the preferred means of resolving disputes *between contracting parties who consent to the process*. *See* 29 U.S.C. § 173(d) ("Final adjustment by a method *agreed upon by the parties* is declared to be the desirable method for settlement of grievance disputes") (emphasis added). Those who have not consented to arbitration—here, the traveling public—cannot be bound by an arbitrator's determination. *See United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) ("arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit").[8]

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[8] *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368 (1974), heavily relied on by the Union (UMWA Br. 34-35) and the Academy (Academy Br. 10), is readily distinguishable. The Union quotes *Gateway Coal* for the proposition that labor policies favoring arbitration " 'are as applicable to labor disputes touching . . . safety . . . as to other varieties of disagreement.' " UMWA Br. 34 (ellipses by the Union). Filling in the ellipses, what the Court actually referred to was "labor disputes touching the safety *of the employees*," 414 U.S. at 379 (emphasis added), not the safety of the public at large. The issue in *Gateway Coal* was thus "the workers' interest in their own safety," *id.*, which presumably can be left to the agreement of the parties or an arbitrator selected by them. The question here is public safety—the impact on those not

Second, one of the reasons courts defer to labor arbitrators is the latter's presumed expertise in "the law of the shop." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 57 (1974). But arbitrators have no comparable expertise in "the law of the land." *Id. See also Wright* v. *Universal Maritime Serv. Corp.*, 525 U.S. 70, 78 (1998) (presumption of arbitrability "does not extend beyond the reach of the principal rationale that justifies it, which is that arbitrators are in a better position than courts *to interpret the terms of a CBA*") (emphasis in original). Arbitrators are not experts in determining whether a properly interpreted collective bargaining agreement is consistent with public policy, which is an issue "ultimately * * * for resolution by the courts." *W.R. Grace*, 461 U.S. at 766. *See* Pet. Br. 25.

Third, even if arbitrators were competent to factor public policy into their decisions, labor law does not authorize them to do so. The role of a labor arbitrator is to interpret and apply the collective bargaining agreement between the parties to the arbitration, and he may not base his decision on factors outside the four corners of that agreement. *See id.* at 25-26. Public safety is notably absent from the Solicitor General's list of factors an arbitrator should consider in a case such as this, *see* SG Br. 26, and the arbitrator's award in this case evinces no consideration of public safety in ordering reinstatement. *See* Pet. App. 28a ("If the arbitrator was misled by the grievant, the arbitrator is confident that the grievant will make another misstep with drug use and be caught."). The LMRA itself recognizes that arbitration is confined to the resolution of disputes "over the *application or interpretation* of an existing collective-bargaining agreement." 29

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parties to the collective bargaining agreement—who have in no way agreed to abide by an arbitrator's decision affecting their safety.

U.S.C. § 173(d) (emphasis added). The public policy question begins, not ends, with such an application or interpretation.

Although the current Solicitor General is willing to leave the question in the hands of an arbitrator, "notwithstanding the fact that the consequences * * * may be felt beyond the employer's place of business," SG Br. 26, the Office has previously explained—when it was urging this Court to vacate an arbitrator's award ordering reinstatement of a postal worker fired for failing to deliver the mail—that "arbitrators are not competent to make the final judgment concerning the degree of risk that the public may legally be forced to assume" and that "external authorities such as courts must retain the final say in order to ensure that overriding public interests are properly vindicated." Reply Brief for the United States, *United States Postal Serv.* v. *National Ass'n of Letter Carriers*, No. 87-59, at 14, 15.

This Court's decision in *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985), strongly supports our analysis. In considering the extent to which collective bargaining agreements preempt state law, the Court noted that

> Section 301 on its face says nothing about the substance of what private parties may agree to in a labor contract. Nor is there any suggestion that Congress, in adopting § 301, wished to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation. Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored. Clearly, § 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law. [*Id.* at 211-212 (footnote omitted).]

The Court therefore held that labor agreements may preempt only those "state-law rights and obligations that *do not exist independently of private agreements*, and that as a result *can be waived or altered by agreement of private parties*." *Id.* at 213 (emphasis added). *See also id.* at 213 n.8 (distinguishing "rights which could be waived by contract between the parties, on the one hand, from an individual's substantive right derived from an independent body of law that could not be avoided by a contractual agreement, on the other"); *Livadas* v. *Bradshaw*, 512 U.S. 107, 123 (1994) (Section 301 does not preempt "nonnegotiable rights conferred on individual employees as a matter of state law") (citing *Lueck*).

The common law public policy doctrine is such "an independent body of law" that cannot be "waived or altered" by private agreement. Obviously, parties cannot contract around a doctrine the very point of which is to limit that for which parties can contract. And if labor and management cannot "contract for what is illegal under state law," they cannot contract for that which violates clearly defined public policy derived from federal law and regulations.

The Solicitor General depicts our position as being that the District Court in this case should have exercised "de novo review" over the arbitrator's decision, and "should have either made its own credibility determination * * *, or conducted a new evidentiary hearing." SG Br. 29, 27. Not so. Courts have been applying the public policy exception to arbitration awards for many years, and they have recognized that the issue is resolved "by taking the facts as found by the arbitrator, but reviewing his conclusions de novo." *Iowa Elec. Light & Power Co.* v. *Local Union 204, IBEW*, 834 F.2d 1424, 1427 (8th Cir. 1987). *See Gulf Coast Indus. Workers Union* v. *Exxon Co., U.S.A.*, 991 F.2d 244, 249 (5th Cir.) (same), *cert. denied*, 510 U.S. 965 (1993); *E.I. DuPont de Nemours & Co.* v. *Grasselli Employees Indep. Ass'n*, 790

F.2d 611, 616 (7th Cir.) (courts applying public policy exception "correctly refused to defer to the arbitrator's conceptions of public policy, [but] they continued to respect his findings of fact"), *cert. denied*, 479 U.S. 853 (1986). Here, there was no need for the District Court to second-guess any of the arbitrator's findings, because the arbitrator made *no* finding to the effect that Smith is likely to be successfully rehabilitated or is unlikely to use drugs again in the future. *See* Pet. Br. 42-43.

Both the Union (UMWA Br. 28-34) and the Solicitor General (SG Br. 24-30) issue dire warnings about the consequence to labor arbitration of applying the public policy exception, even though the exception has been a comfortable corollary to the development of contract law over the centuries and has not given rise to an era of industrial strife in those circuits that have adopted our position. When the shoe was on the other foot, the Office of the Solicitor General recognized that organized labor "cries 'wolf' in suggesting that empowering federal courts to make these judgments will lead to the destruction of the private arbitration system," in part because "courts have long been judging under the authority of other laws—such as the antitrust laws and the labor laws—whether particular terms of collective bargaining agreements (and arbitration awards implementing them) create legally unacceptable risks of future harm to well-defined and dominant public policies." Reply Brief for the United States, *United States Postal Serv.* v. *National Ass'n of Letter Carriers*, No. 87-59, at 15, 16.

* * *

For centuries courts have refused to enforce not only illegal contracts, but also those that do violence to public policy. Courts have done so both to protect third parties who may be harmed by private compacts in which they had no say and to

protect themselves from becoming accomplices in the public policy violation. The proper test is not, of course, the court's subjective sensibilities, but whether there is a clearly established policy firmly rooted in law, rule, and precedent. Here, there is such a policy, and it is violated by an agreement that requires a court to return a repeat drug user, as to whom deterrence and rehabilitation have already failed, to a job in which a further lapse on his part may claim the lives of innocent motorists.

CONCLUSION

For the foregoing reasons, and those in petitioner's opening brief, the judgment below should be reversed.

Respectfully submitted,

RONALD E. MEISBURG
HEENAN, ALTHEN & ROLES
1110 Vermont Avenue, N.W.
Suite 400
Washington, D.C. 20005
(202) 887-0800

JOHN G. ROBERTS, JR.*
DAVID G. LEITCH
H. CHRISTOPHER BARTOLOMUCCI
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

ANNA M. DAILEY
DONNA C. KELLY
HEENAN, ALTHEN & ROLES
1380 One Valley Square
P.O. Box 2549
Charleston, WV 25329
(304) 342-8960

* Counsel of Record

Counsel for Petitioner

Supreme Court, U.S.
FILED
JUL 11 2000
CLERK

(10)

No. 99-1038

In the Supreme Court of the United States

EASTERN ASSOCIATED COAL CORPORATION,
PETITIONER

v.

UNITED MINE WORKERS OF AMERICA, DISTRICT 17,
ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor General

WILLIAM KANTER
MARK W. PENNAK
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

NANCY E. MCFADDEN
General Counsel

PAUL M. GEIER
Assistant General Counsel

PETER J. PLOCKI
Senior Attorney
Department of Transportation
Washington, D.C. 20590

35 pp

QUESTION PRESENTED

Whether the arbitrator's award in this case, which ordered reinstatement (after a three-month suspension) of a commercial truck driver who had twice tested positive for marijuana, should be set aside as contrary to public policy.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	9
Argument	11
A. So long as Smith complies with the Department of Transportation's rehabilitation requirements, his reinstatement to a safety-sensitive position is consistent with "public policy" as reflected in the Department's regulations	13
B. The courts below correctly declined to exercise de novo review over the arbitrator's decision	24
Conclusion	30

TABLE OF AUTHORITIES

Cases:

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 (1974)	29
United Paperworkers Int'l Union v. *Misco*, 484 U.S. 29 (1987)	12, 25, 26, 27
United Parcel Serv., Inc. v. *Mitchell*, 451 U.S. 56 (1981)	28
United Steelworkers of America v. *American Mfg. Co.*, 363 U.S. 564 (1960)	24, 29
United Steelworkers of America v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960)	24, 25, 27, 28
United Steelworkers of America v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960)	24, 25, 26, 29

Statutes and regulations:

Omnibus Transportation Employee Testing Act of 1991, Pub. L. No. 102-143, Tit. V, 105 Stat. 952	2
§ 2(3), 105 Stat. 953	2, 14
§ 2(4), 105 Stat. 953	2, 14
§ 2(5), 105 Stat. 953	2

Statutes and regulations—Continued: Page

§ 2(7), 105 Stat. 953 ..... 2, 14
Labor-Management Relations Act of 1947, 29 U.S.C. 141 *et seq.*:
29 U.S.C. 171(a) 6, 15, 20
29 U.S.C. 173(d) 6, 29
49 U.S.C. 31306(b)(1)(A) (1994 & Supp. III 1997) 2
49 U.S.C. 31306(e) 3, 14
49 U.S.C. 31306(f) 3, 19
49 U.S.C. 31310(b)(1)(A) 3, 19
49 U.S.C. 45103(c)(1) 19
49 U.S.C. 45103(c)(2) 19
49 C.F.R.:
Pt. 382 4
Section 382.213(a) 14
Section 382.215 14
Section 382.501 ..... 15, 17
Section 382.501(a) 3
Section 382.501(b) 3
Section 382.503 17
Section 382.507 ..... 3, 17
Sections 382.601-382.605 3
Section 382.605 ..... 4, 5, 10, 17, 18, 20
Section 382.605(b) 4, 15
Section 382.605(c)(1) 4, 15, 16
Section 382.605(c)(2) 4
Section 382.605(c)(2)(i) 4, 15
Section 382.605(c)(2)(ii) 4, 15, 16
Section 382.605(d) 4
Pt. 383:
Section 383.5 21
Section 383.51 5
Section 383.51(b)(2)(i)-(ii) 3, 5
Section 383.51(b)(2)(v) 5
Section 383.51(b)(3)(i) 3
Section 383.51(c) 5
Section 383.51(c)(2)(i) 21

Miscellaneous: Page

57 Fed. Reg. (1992):
p. 59,585 (proposed 49 C.F.R. 382.1107(a)(2)(i)) 5, 21
pp. 59,393-59,394 14
p. 59,396 14
59 Fed. Reg. (1994):
p. 7493 ..... 5, 21
p. 7502 ..... 6, 15, 20
p. 7503 ..... 5, 15

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ON WRIT OF CERTIORARI
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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

INTEREST OF THE UNITED STATES

This case presents the question whether a federal court should set aside, as contrary to public policy, a labor arbitrator's decision ordering reinstatement (after a three-month suspension) of a commercial truck driver who had twice tested positive for marijuana. Congress directed the United States Department of Transportation to promulgate regulations governing the use of alcohol and illegal drugs by persons employed in the transportation industry, including commercial truck drivers. The regulations promulgated pursuant to that statutory directive address, *inter alia*, the categories of persons subject to alcohol and drug testing, the manner in which those tests will be conducted, and the consequences that follow from a failed test. The United States has a substantial interest in ensuring

that judicial review of arbitral awards under collective bargaining agreements does not undermine either DOT's regulations, or the federal labor policy favoring arbitration as the method for finally resolving disputes under collective bargaining agreements.

STATEMENT

1. In the Omnibus Transportation Employee Testing Act of 1991 (Testing Act), Pub. L. No. 102-143, Tit. V, 105 Stat. 952, Congress addressed the threat to public safety posed by drug and alcohol abuse on the part of individuals employed in the transportation industry. The Testing Act contains congressional findings that, *inter alia*, "the greatest efforts must be expended to eliminate the abuse of alcohol and use of illegal drugs, whether on duty or off duty, by those individuals who are involved in the operation of aircraft, trains, trucks, and buses"; "the use of alcohol and illegal drugs has been demonstrated to affect significantly the performance of individuals, and has been proven to have been a critical factor in transportation accidents"; "the most effective deterrent to abuse of alcohol and use of illegal drugs is increased testing, including random testing"; and "rehabilitation is a critical component of any testing program for abuse of alcohol or use of illegal drugs, and should be made available to individuals, as appropriate." Testing Act § 2(3), (4), (5) and (7), 105 Stat. 953.

The Testing Act in its current form states that "[i]n the interest of commercial motor vehicle safety, the Secretary of Transportation shall prescribe regulations * * * that establish a program requiring motor carriers to conduct preemployment, reasonable suspicion, random, and post-accident testing of operators of commercial motor vehicles for the use of alcohol or a controlled substance." 49 U.S.C. 31306(b)(1)(A) (1994 & Supp. III 1997). The Testing Act further provides that

the Secretary "shall prescribe regulations establishing requirements for rehabilitation programs that provide for the identification and opportunity for treatment of operators of commercial motor vehicles who are found to have used alcohol or a controlled substance in violation of law or a Government regulation." 49 U.S.C. 31306(e). The Act states in addition that the Secretary "shall decide on appropriate sanctions for a commercial motor vehicle operator who is found, based on tests conducted and confirmed under this section, to have used alcohol or a controlled substance in violation of law or a Government regulation but who is not under the influence of alcohol or a controlled substance as provided in this chapter." 49 U.S.C. 31306(f).[1]

2. In response to, *inter alia*, the statutory directives described above, the Department of Transportation (DOT) has promulgated detailed regulations that require drug testing of a wide range of employees in the transportation industry. With respect to commercial drivers, the regulations state that "[e]xcept as provided in subpart F of this part [49 C.F.R. 382.601-382.605], no driver shall perform safety-sensitive functions, including driving a commercial motor vehicle, if the driver has engaged in" prohibited drug use. 49 C.F.R. 382.501(a); see also 49 C.F.R. 382.501(b) ("No employer shall permit any driver to perform safety-sensitive functions, including driving a commercial motor vehicle, if the employer has determined that the driver has violated this section."); 49 C.F.R. 382.507 ("Any employer or driver who violates the requirements of this part shall

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[1] Federal law mandates disqualification from commercial driving for at least one year of any person who is convicted of operating a commercial motor vehicle while under the influence of alcohol or a controlled substance. 49 U.S.C. 31310(b)(1)(A); 49 C.F.R. 383.51(b)(2)(i)-(ii) and (3)(i).

be subject to the penalty provisions of 49 U.S.C. section 521(b).”). Thus, if an employee tests positive for controlled substances, both the employer and the employee are subject to penalties if the employee thereafter performs a safety-sensitive function without first complying with the requirements of Subpart F of 49 C.F.R. Part 382.

In Subpart F, and Section 382.605 in particular, DOT established rehabilitation requirements that must be satisfied before an employee who has tested positive for a controlled substance may return to a safety-sensitive position. First, the driver “shall be evaluated by a substance abuse professional [SAP] who shall determine what assistance, if any, the employee needs in resolving problems associated with * * * controlled substances use.” 49 C.F.R. 382.605(b).[2] Second, “[b]efore a driver returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited by subpart B of this part, the driver shall undergo a return-to-duty * * * controlled substances test with a verified negative result.” 49 C.F.R. 382.605(c)(1). Finally, if the driver has been “identified [by the SAP] as needing assistance in resolving problems associated with * * * controlled substances use,” 49 C.F.R. 382.605(c)(2), the SAP must determine that the driver has followed the prescribed rehabilitation program, 49 C.F.R. 382.605(c)(2)(i), and the driver must be subject to at least six unannounced drug tests during the 12 months following his return to duty, 49 C.F.R. 382.605(c)(2)(ii).

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[2] The regulations provide that “[t]he choice of substance abuse professional and assignment of costs shall be made in accordance with employer/driver agreements and employer policies.” 49 C.F.R. 382.605(d).

The DOT regulations do not establish any additional prerequisites to reinstatement for a driver who fails a drug or alcohol test on two or more occasions. A proposed rule issued by DOT for comment in December 1992 included a provision stating that "[a] driver who, during any 3-year period, is found to have a verified positive controlled substances test result twice in separate incidents, is prohibited from driving any commercial motor vehicle * * * for a period of 60 consecutive days." 57 Fed. Reg. 59,585 (1992) (proposed 49 C.F.R. 382.1107(a)(2)(i)). After considering public comments on the proposed regulations, however, the agency declined to adopt that disqualification rule. 59 Fed. Reg. 7493 (1994). The agency made clear that "[t]he only driving prohibition period for a controlled substances violation is similar to that for alcohol—completion of rehabilitation requirements and a return-to-duty test with a negative result." *Ibid.*[3]

So long as a commercial driver satisfies the rehabilitation requirements of 49 C.F.R. 382.605, he is eligible under the regulations to perform safety-sensitive duties. See 59 Fed. Reg. at 7493; *id.* at 7503. The preamble to the regulations makes clear, however, that "[c]ompliance with the prescribed treatment and passing the test(s) will not guarantee a right of reemployment." *Ibid.* Consistent with the DOT regulations, an employer may decline to offer rehabilitation to an

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[3] DOT regulations require disqualification, for specified periods, of individuals convicted of certain offenses. See 49 C.F.R. 383.51. Those include operating a commercial motor vehicle while under the influence of alcohol or controlled substances, see 49 C.F.R. 383.51(b)(2)(i)-(ii); use of a commercial motor vehicle in the commission of a drug felony, see 49 C.F.R. 383.51(b)(2)(v); and the commission of two or more serious traffic violations within a three-year period while operating a commercial motor vehicle, see 49 C.F.R. 383.51(c).

employee who tests positive and may instead discharge every such worker. The 1994 preamble "encourage[s] those employers who can afford to provide rehabilitation to do so through established health insurance programs, since it helps their drivers, benefits morale, is often cost-effective and ultimately contributes to the success of both their business and their testing programs." *Id.* at 7502. The agency has expressly declined, however, "to mandate employer-provided rehabilitation," deciding instead that the matter "should be left to management/driver negotiation." *Ibid.*

3. The Labor-Management Relations Act of 1947 (LMRA) states the national policy that "sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees." 29 U.S.C. 171(a). The LMRA further states that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." 29 U.S.C. 173(d).

4. James Smith, a drilling operator for petitioner Eastern Associated Coal Corporation, applied for a position as a Mobile Equipment Operator. Because the new position required a commercial driver's license, Smith was subject to alcohol and drug testing under the DOT regulations. In March 1996 Smith tested positive for marijuana. Petitioner sought to discharge him, but Smith grieved his discharge and the arbitrator ordered him reinstated, subject to a suspension of 30 days

without pay and the requirement that he participate in a substance abuse program. Smith passed four drug tests between April 1996 and January 1997, but in June 1997 he again tested positive for marijuana. On July 14, 1997, petitioner suspended Smith with the intent to discharge him. Smith and his union (the respondent in this case) contested the discharge. Pet. App. 6a-8a, 24a-26a.

The arbitrator in the second proceeding stated that "[w]hile [Smith] has been a very good employee during his 17 years with the company, it is obvious he has not been rehabilitated by the opportunity provided by the company's employee assistance program or the earlier arbitration." Pet. App. 26a. The arbitrator stated as well that "drugs have a negative impact on job performance, safety and company liability." *Id.* at 28a.

The arbitrator nevertheless ordered Smith reinstated, subject to various conditions. He explained:

> [Smith] made a very personal appeal under oath to the arbitrator concerning a personal/family problem which caused this one time lapse in drug usage. The arbitrator found this testimony creditable. If the arbitrator was misled by [Smith], the arbitrator is confident that [Smith] will make another misstep with drug use and be caught. The remedy provided here will assure that the company and union will not be required to use arbitration again for [Smith] where drugs are involved.

Pet. App. 28a. Smith's reinstatement was made subject to the conditions that (1) he would not be paid for the period of his suspension, which would last until October 20, 1997;[4] (2) the prior arbitral award would be

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[4] The date of the arbitrator's decision was August 1, 1997. Pet. App. 29a. Because Smith was suspended by petitioner on July 14,

"reinstated"; (3) Smith would reimburse the company and the union for the arbitrators' bills in both arbitral proceedings; (4) Smith would provide a signed, undated letter of resignation that petitioner may accept if Smith fails a drug test during the next five years; and (5) Smith would be subject to random drug testing during the period of his suspension, and petitioner could accept his resignation if he refused to take a drug test. *Id.* at 29a.

5. Petitioner filed suit in federal district court seeking vacatur of the arbitrator's award. The district court granted respondent's motion for summary judgment. Pet. App. 5a-21a. The court found that the arbitrator's award was "rationally inferable" from the applicable collective bargaining agreement. *Id.* at 16a. The court also rejected petitioner's contention that the award should be vacated as contrary to public policy. *Id.* at 17a-21a. The district court acknowledged that "[t]here is a plenitude of positive law to support the existence of a well defined and dominant public policy against the performance of safety sensitive jobs by employees under the influence of drugs." *Id.* at 18a. It held, however, that the award in this case did not violate that public policy. The court explained:

> [Petitioner] argues that the public policy embodied in the DOT Regulations is sufficiently well defined and dominant to support vacation of Arbitrator Barrett's award. There is no question that the DOT Regulations relied upon by [petitioner] articulate a well defined and dominant public policy against drug use by persons employed as commercial motor vehicle drivers. Nevertheless, the DOT Regulations

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1997 (*id.* at 24a), the effect of the arbitrator's decision was that Smith was suspended without pay for slightly more than three months.

> do not express an explicit, well defined public policy permanently enjoining the employment of commercial motor vehicle drivers who test positive for drug use. Specifically, the DOT Regulations do not require that employees who test positive for drug use be automatically discharged. Here, the arbitrator ordered reinstatement of Mr. Smith, subject, however, to several conditions, including continued random drug testing and mandatory resignation in the event of a future positive drug test. Because the DOT Regulations do not make it illegal to reinstate employees who test positive for drug use, it cannot be said that the DOT Regulations "specifically militate against the relief ordered by the arbitrator" in this case. Consequently, the public policy exception does not apply inasmuch as the arbitrator's award is consistent with the DOT Regulations.

Id. at 20a-21a (citation and footnote omitted).

6. The court of appeals affirmed. Pet. App. 1a-4a. The court simply recounted the facts and the procedural history of the case and stated that it "affirm[ed] on the reasoning of the district court." *Id.* at 4a.

SUMMARY OF ARGUMENT

1. Pursuant to statutory authority, the Department of Transportation (DOT) has promulgated regulations addressing the dangers posed by employee drug use within the transportation industry. Those regulations mandate drug testing of employees who perform safety-sensitive functions, and they establish prerequisites to the reinstatement of employees who test positive. A worker who tests positive must be immediately removed from safety-sensitive duties and may not resume such duties until he has been evaluated by a substance abuse professional (SAP), has successfully completed any program of rehabilitation that the SAP

prescribes, and has passed a return-to-duty drug test. DOT has made clear that employers are free to impose additional sanctions (including outright discharge) on employees who test positive, subject to any independent constraints on management discretion that the employer has voluntarily assumed.

In our view, the arbitrator's reinstatement order in this case is most plausibly construed to be contingent upon Smith's compliance with the pertinent DOT regulations—and, in particular, on his successful completion of any rehabilitation program that the SAP prescribes. So construed, the award is fully consistent with federal policy and should not be set aside by a federal court. If an employee satisfies the prerequisites to reinstatement established by the responsible executive agency, a federal court cannot properly refuse enforcement of an arbitrator's reinstatement order based on the court's belief that the conditions set forth in the regulations are insufficient to protect the public safety.

The fact that Smith failed *two* drug tests within a 16-month period does not significantly alter the analysis. Under a proposed regulatory provision put forth for public comment in December 1992, any driver who failed two drug tests within a three-year period would have been prohibited from operating a commercial motor vehicle for a period of 60 days. Even if that proposed rule had been adopted, the arbitral award in the instant case would be valid, since under the arbitrator's decision Smith was suspended for slightly more than three months. After considering public comments, DOT declined to mandate any specific period of disqualification even for recidivist drug users, concluding instead to entrust decisions regarding repeat offenders to private ordering and the sound judgment of arbitrators, subject to the rehabilitation requirements set forth in 49 C.F.R. 382.605. Smith's status as

a recidivist is surely relevant in determining the appropriate response to his positive drug test. But the text and history of the pertinent DOT regulations are inconsistent with any contention that discharge is the *only* permissible sanction for a recidivist drug offender.

2. The courts below correctly deferred to the arbitrator's judgment rather than attempting a de novo determination of the appropriate sanction for Smith's misconduct. The arbitrator's specialized training and repeated exposure to workplace disputes gives him a significant advantage (as compared to a federal judge) in resolving the pertinent remedial issues, notwithstanding the fact that the consequences of the arbitrator's decision may be felt beyond the employer's place of business. That is particularly so in light of the arbitrator's ability to see and hear the witnesses firsthand. A deferential standard also helps to ensure that the arbitrator's decision will be treated when issued as essentially final, thereby allowing the parties to put the controversy behind them. Finally, enforcing the parties' agreement to entrust workplace disputes to the arbitrator serves the national interest in industrial peace, since the employer's agreement to arbitrate has historically served as the *quid pro quo* for the union's promise not to strike.

ARGUMENT

The arbitrator's decision in this case rests on three subsidiary propositions. *First*, the arbitrator construed the collective bargaining agreement as authorizing but not mandating discharge as a sanction for employee drug use. *Second*, the arbitrator construed his own remedial powers expansively. While framing the question before him as whether the company had established "just cause" for Smith's discharge, Pet. App. 24a, the arbitrator evidently (though implicitly) understood his

task to be that of determining, not whether discharge was a *permissible* sanction under the terms of the agreement, but whether discharge was the *fairest* or *most appropriate* sanction under all the facts and circumstances. In essence, the arbitrator understood the agreement as delegating to him the sort of discretionary authority that would otherwise be exercised by company management. *Third*, the arbitrator considered all the relevant facts and concluded that a three-month suspension without pay, subject to various conditions, was a more appropriate punishment than outright discharge.

At least in this Court, petitioner does not assert that any of those arbitral rulings is wrong as a matter of contract interpretation. Petitioner does not, that is, contend that the collective bargaining agreement either (1) mandates the discharge of every covered employee who is found to have used marijuana, (2) gives management unreviewable discretion to determine the appropriate sanction for an individual who tests positive, or (3) precludes reinstatement under the facts and circumstances of this case. Rather, petitioner's argument is that the arbitral award should be vacated as contrary to public policy even assuming that the award is faithful to the intent of the contracting parties.

For the reasons that follow, that argument lacks merit. This Court has emphasized that judicial authority to vacate an arbitral award as contrary to public policy "is limited to situations where the contract as interpreted [by the arbitrator] would violate some explicit public policy that is well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *United Paperworkers Int'l Union* v. *Misco*, 484 U.S. 29, 43 (1987) (internal quotation marks omitted). The Department of Transporta-

tion (DOT) has promulgated detailed regulations that, *inter alia*, define the prerequisites that a commercial driver must satisfy in order to resume safety-sensitive duties after testing positive for illegal drugs. So long as those requirements are satisfied, DOT's regulations leave with the employer the ultimate decision whether the employee should be reinstated, subject to any constraints on management discretion (*e.g.*, an agreement to arbitrate) that the employer has voluntarily assumed. That regulatory scheme defines (at least insofar as the federal government is concerned) the relevant "public policy" in this area. If a driver satisfies the regulatory preconditions to reinstatement, and the decisionmaker chosen by the parties concludes that reinstatement is appropriate, we see no basis on which a federal court may direct a different outcome.

A. So Long As Smith Complies With The Department Of Transportation's Rehabilitation Requirements, His Reinstatement To A Safety-Sensitive Position Is Consistent With "Public Policy" As Reflected In The Department's Regulations

1. As we explain above (see pp. 2-3, *supra*), Congress has vested the Department of Transportation (DOT) with broad authority to promulgate rules addressing the dangers posed by employee drug use within the transportation industry. In devising appropriate regulations, DOT sought to balance three important principles—each of which is firmly grounded in federal statutory law. First, the use of illegal drugs by workers in safety-sensitive positions poses a substantial threat to public safety.[5] See Omnibus Transportation

[5] The DOT regulations make clear that individuals who currently use illegal drugs or have measurable amounts of such drugs in their systems are ineligible to perform safety-sensitive functions, regardless of whether the drug use occurs on or off duty.

Employee Testing Act of 1991 (Testing Act), Pub. L. No. 102-143, Tit. V, § 2(3) and (4), 105 Stat. 953 (congressional findings); p. 2, *supra*. Second, treatment and rehabilitation of employees who use illegal drugs serves important public and private interests. See Testing Act § 2(7), 105 Stat. 953 (congressional finding); 49 U.S.C. 31306(e) (requiring DOT to "prescribe regulations establishing requirements for rehabilitation programs").[6] Third, federal labor law reflects a preference for private resolution, through the collective bargaining

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See 49 C.F.R. 382.213(a) ("No driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions when the driver uses any controlled substance."); 49 C.F.R. 382.215 ("No driver shall report for duty, remain on duty or perform a safety-sensitive function, if the driver tests positive for controlled substances."). That rule does not reflect a judgment that every individual who tests positive for illegal drugs is in fact impaired. DOT has recognized that "drugs may stay in the body for some time and the presence of drugs in urine does not necessarily mean that the person was affected by the drugs on the day tested or during the performance of safety-sensitive functions." 57 Fed. Reg. at 59,393-59,394. But precisely because urine testing cannot determine whether an individual is impaired at a particular time, any commercial driver who tests positive for illegal drugs must be regarded as a *potential* threat to public safety. See *id.* at 59,396 ("It is not possible to determine, based on a chemical test, at what amount a particular drug impairs each user's performance of particular functions and thus could have safety consequences, so the mere presence of the drug must be prohibited.").

[6] Treatment and rehabilitation of such employees (as opposed to outright discharge) most obviously serves the individual's own interest in resuming gainful employment and in avoiding the risk of future criminal prosecution that inherently attends the use of illegal drugs. In addition, however, rehabilitation and treatment serves the interests of the transportation industry and the national economy by allowing a worker's specialized skills to be put to their most productive use.

process, of issues regarding workplace management. 29 U.S.C. 171(a).

The DOT regulations require testing of drivers in safety-sensitive positions in order to deter the use of illegal drugs and to detect those individuals who engage in drug use. The regulations require the immediate removal from performance of safety-sensitive duties of any individual who tests positive for illegal drugs. 49 C.F.R. 382.501. Under the rules, the driver is eligible to resume safety-sensitive duties only after he has been evaluated by a substance abuse professional (SAP), 49 C.F.R. 382.605(b); has passed a return-to-duty drug test, 49 C.F.R. 382.605(c)(1); and has successfully completed any program of rehabilitation that the SAP prescribes, 49 C.F.R. 382.605(c)(2)(i).[7] The rules do not, however, compel the employer to offer rehabilitation or to reinstate a driver who has complied with the regulatory requirements. See 59 Fed. Reg. at 7502 (availability of rehabilitation should not be mandated by rule but "should be left to management/driver negotiation"); *id.* at 7503 ("Compliance with the prescribed treatment and passing the test(s) will not guarantee a right of reemployment."). In short, the regulations establish legal prerequisites to the resumption of safety-sensitive duties by drivers who have tested positive for illegal drugs, while leaving to private ordering the determination whether such workers will in fact be reinstated.

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[7] In addition, if the SAP has concluded that the employee needs assistance in resolving problems associated with drug use, the employee "[s]hall be subject to unannounced follow-up alcohol and controlled substances tests administered by the employer following the driver's return to duty. The number and frequency of such follow-up testing shall be as directed by the [SAP], and consist of at least six tests in the first 12 months following the driver's return to duty." 49 C.F.R. 382.605(c)(2)(ii).

2. The arbitrator's decision in this case does not by its terms require compliance with DOT's rehabilitation regulations as a prerequisite to Smith's resumption of safety-sensitive duties. The award orders that Smith be "returned to work on October 20, 1997," Pet. App. 29a, and it does not explicitly make that directive contingent on Smith's evaluation by an SAP or his successful completion of any rehabilitation program that the SAP prescribes. The award states that "[d]uring [Smith's] suspension period, [Smith's] name shall remain in the company's random drug testing program." *Ibid.* It does not indicate, however, that Smith must pass a return-to-duty test, nor does it require periodic drug testing after the suspension is over, even though the former is an absolute prerequisite to resumption of safety-sensitive duties (49 C.F.R. 382.605(c)(1)), and the latter is required for any employee identified by the SAP as needing assistance in resolving drug-related problems (49 C.F.R. 382.605(c)(2)(ii)).

If the arbitral award is construed as entitling Smith to resume safety-sensitive duties without completing DOT's rehabilitation requirements, the award is (at least to that extent) invalid. The DOT regulations make clear that

> [n]o driver who has engaged in [illegal drug use] shall perform safety-sensitive functions, including driving a commercial motor vehicle, unless the driver has met the requirements of § 382.605. No employer shall permit a driver who has engaged in [illegal drug use] to perform safety-sensitive functions, including driving a commercial motor vehicle, unless the driver has met the requirements of § 382.605.

49 C.F.R. 382.503. An employer and union may agree to *additional* restrictions on the performance of safety-sensitive functions by workers who have tested positive, but they may not waive the minimum prerequisites to reinstatement that the regulations impose. Obligations imposed by law cannot be superseded by private contract. Thus, even if petitioner had never sought vacatur of the arbitral award, Smith could not lawfully resume his duties as a commercial driver without first satisfying the requirements of 49 C.F.R. 382.605.

3. Although the arbitrator's decision does not in terms mandate compliance with the DOT rehabilitation requirements, the award is capable of being implemented in a manner that is consistent with those rules. The award was issued on August 1, 1997, and ordered that Smith be "returned to work on October 20, 1997." Pet. App. 29a. Depending on the SAP's evaluation, any required rehabilitation program might feasibly have been completed before the end of Smith's suspension. If the rehabilitation program was still ongoing as of October 20, 1997, Smith could have been placed temporarily in a job that did not require the performance of safety-sensitive functions. The arbitrator's decision states that "[t]he company and union may agree that unusual or unforeseen circumstances justify waiving any conditions set forth above," *ibid.*, thus explicitly preserving the ability of the parties to make any necessary adjustments in the terms of the award.[8] And

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[8] Under the DOT regulations, the employee and employer are both subject to penalties if a commercial driver who has tested positive for illegal drugs resumes safety-sensitive duties without satisfying the agency's rehabilitation requirements. See 49 C.F.R. 382.501, 382.507. Thus, both the union and the employer have an obvious incentive to ensure that an ambiguous arbitral award is implemented in a manner consistent with governing law.

while the award does not itself require Smith to undergo either a back-to-duty test or any follow-up testing, it also does not purport to exempt him from any drug tests that are otherwise mandated by law. Moreover, the arbitrator "reinstated" the award entered in the prior arbitral proceeding (see *ibid.*), and that earlier award required Smith to participate in a substance abuse program (see *id.* at 25a).

Because the award is readily capable of being implemented in a manner consistent with the DOT regulations, and because petitioner has not contended that the award violates the rehabilitation requirements and we see no basis for assuming that the award is intended to contradict obligations imposed by law, we believe the arbitrator's reinstatement order should be construed to be contingent upon Smith's compliance with Section 382.605, including successful completion of any rehabilitation program prescribed by the SAP. So construed, the award is consistent with federal policy as set forth in the Testing Act and the DOT regulations. The decision of the court of appeals should therefore be affirmed.

The thrust of petitioner's argument is that reinstatement of a commercial driver who has used illegal drugs is logically inconsistent with the public policy against drug use by workers in safety-sensitive positions, and with the DOT testing requirements designed to further that policy. Petitioner's argument reflects an incomplete understanding of the agency's regulatory scheme. The regulations are not silent regarding the consequences of a positive drug test. To the contrary, the rules describe in detail the conditions that an employee who tests positive must satisfy in order to be eligible to resume safety-sensitive duties, while leaving to private ordering the decision whether reinstatement is appropriate in a particular case. The regulatory

scheme fashioned by DOT—the federal agency assigned by Congress to implement the Testing Act—defines the relevant "public policy" in this area. If an employee satisfies the regulatory prerequisites to resumption of safety-sensitive duties, a federal court cannot properly refuse enforcement of an arbitrator's reinstatement order based on the court's belief that the conditions set forth in the rules are insufficient to protect the public safety.[9]

As we explain above (see pp. 5-6, 15-16, *supra*), the DOT regulations do not require employers to make rehabilitation programs available, and they do not prevent an employer from discharging workers who test positive for illegal drugs. Petitioner suggests (Br. 46-47) that if employers are permitted to impose sanctions for drug use above and beyond those mandated by the regulations, then federal courts must be free to do so as well. That is a non sequitur. DOT's statement

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[9] With respect to some categories of drug users within the transportation industry, Congress has itself mandated a specific period of disqualification from the performance of safety-sensitive duties. In the aviation industry, for example, Congress has imposed a permanent disqualification from the performance of certain safety-sensitive jobs by persons who have used drugs while on duty, or who have again used drugs after beginning or completing a rehabilitation program. See 49 U.S.C. 45103(c)(1) and (2). A commercial driver who is convicted of driving a commercial motor vehicle while under the influence of drugs is subject to a mandatory one-year disqualification. See 49 U.S.C. 31310(b)(1)(A). Congress has declined, however, to mandate a specific disqualification period for drivers in Smith's position. Rather, Congress has directed the Secretary of Transportation to "decide on appropriate sanctions for a commercial motor vehicle operator who is found * * * to have used * * * a controlled substance in violation of law or a Government regulation but who is not under the influence of * * * a controlled substance as provided in this chapter." 49 U.S.C. 31306(f).

that the availability of rehabilitation "should be left to management/driver negotiation" (59 Fed. Reg. at 7502) is itself an expression of agency *policy*. Consistent with traditional principles of economic liberty and freedom of contract, and with the national policy of encouraging resolution of workplace management issues through the collective bargaining process, see 29 U.S.C. 171(a); p. 6, *supra*, DOT chose to entrust private parties with significant discretion to determine whether reinstatement is appropriate in particular cases. If Smith satisfies the regulatory prerequisites to reinstatement, and the decisionmaker chosen by the parties concludes that reinstatement (after a three-month suspension) is appropriate, enforcement of the arbitral award could not plausibly be deemed inconsistent with any policy judgment reflected in the DOT regulations. To the contrary, a judicial decree setting the award aside would be inconsistent both with the regulatory balance struck by DOT, and with the federal labor policy (see pp. 24-25, *infra*) favoring the resolution of contract disputes through arbitration.

4. The fact that Smith failed *two* drug tests within a 16-month period does not significantly alter the analysis. Employers are free under the regulations to adopt policies requiring discharge of workers who fail two (or any other number) of drug tests within a specified period of time. DOT has declined, however, to require discharge of recidivist drug users (or any sub-category of recidivist drug users), concluding instead to entrust decisions regarding repeat offenders to private ordering and the sound judgment of arbitrators, subject to the minimum prerequisites for resumption of safety-sensitive duties set forth in 49 C.F.R. 382.605.

Contrary to petitioner's contention (Br. 46), moreover, the history of the pertinent DOT rulemaking makes clear that the absence of any provision directed

specifically at recidivist drug users reflects a deliberate agency policy choice. A proposed regulation put forth for public comment in December 1992 included a provision stating that "[a] driver who, during any 3-year period, is found to have a verified positive controlled substances test result twice in separate incidents, is prohibited from driving any commercial motor vehicle * * * for a period of 60 consecutive days." 57 Fed. Reg. at 59,585 (proposed 49 C.F.R. 382.1107(a)(2)(i)). Even if that proposed rule had been adopted, the arbitral award in the instant case would be valid, since under the arbitrator's decision Smith was suspended for slightly more than three months. After considering public comments on the proposed regulations, however, the agency declined to mandate any specific period of disqualification even for recidivist drug users. See 59 Fed. Reg. at 7493. The agency made clear that "[t]he only driving prohibition period for a controlled substances violation is similar to that for alcohol—completion of rehabilitation requirements and a return-to-duty test with a negative result." *Ibid.* There is consequently no basis for petitioner's suggestion (Br. 46) that the absence of a provision specifically directed at recidivist drug users creates a regulatory gap that a court may fill under the rubric of enforcing "public policy."[10]

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[10] DOT *has* specifically addressed the issue of recidivist *traffic* offenders, and has mandated a 60-day period of disqualification for a commercial driver who is twice convicted, within a three-year period, of "serious traffic violations" committed during the operation of a commercial vehicle. 49 C.F.R. 383.51(c)(2)(i). If Smith had incurred two reckless driving convictions (see 49 C.F.R. 383.5, defining "serious traffic violation" to include reckless driving), an arbitral award ordering him reinstated after a three-month suspension could not plausibly be challenged as violative of public policy (given the existence of a DOT regulation specifically ad-

Smith's status as a recidivist is surely relevant in determining the appropriate response to his positive drug test. The fact that Smith has twice tested positive for marijuana may affect the SAP's assessment of his prospects for rehabilitation or the nature of the rehabilitation program that the SAP prescribes. Under the arbitrator's decision, moreover, Smith was subjected to a significantly longer suspension after his second positive drug test than after his first, and to additional sanctions (*e.g.*, the requirement that he pay the costs of both arbitral proceedings) as well. And nothing in DOT's regulations would prevent petitioner from insisting, in negotiations with the union, on a contract provision permitting it to discharge every commercial driver who failed two drug tests within a specified period of time. The text and history of the pertinent DOT regulations, however, are inconsistent with any contention that discharge is the *only* legally permissible sanction for recidivist drug offenders.

Finally, we do not agree with petitioner's contention (Br. 43) that "reinstating Smith would make a mockery of the drug testing regime mandated by Congress and the DOT regulations." The DOT regulations expressly

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dressing the treatment of recidivist traffic offenders and prescribing a minimum disqualification period of 60 days). Petitioner's argument thus depends on the proposition that a commercial driver who twice tests positive for marijuana, but has not been shown to have driven while impaired or otherwise to have operated his vehicle in an improper manner, poses a greater threat to public safety than does an employee who has twice been convicted of reckless driving. Reasonable people may surely hold that view, but it is difficult to see how that comparative judgment can be regarded (particularly in the existing statutory and regulatory context) as the province of a federal court. And it is still more difficult to see how such a "public policy" can be inferred from DOT's considered *refusal* to specify a mandatory period of disqualification for recidivist drug users.

contemplate the prospect that drivers who test positive will (after completion of specified requirements) eventually be permitted to resume safety-sensitive duties. The regulations and accompanying preamble also reflect the view that the decision whether reinstatement is advisable in a particular case is appropriately left to private ordering. It is therefore difficult to see how reinstatement in accordance with the regulatory requirements, when decreed by the parties' chosen decisionmaker, could make a "mockery" of the agency's rules.

In our view, drug testing of commercial drivers serves important remedial and deterrent purposes even if a positive test (or a second positive test) does not invariably result in discharge of the offending employee. Drug testing identifies those workers who may be in need of treatment and rehabilitation, and it ensures that such workers do not resume safety-sensitive duties until they have been evaluated by an SAP and have successfully completed any rehabilitation program that the SAP prescribes. Drug testing also provides employers with relevant information and thus enables them to take whatever additional steps they deem appropriate, subject to any constraints on management discretion that the employer has voluntarily assumed. In addition, disciplinary measures imposed as a result of a positive drug test may have a substantial deterrent effect on other workers even if the penalty falls short of outright discharge. Reasonable people may disagree as to whether Smith deserved a more severe punishment than the arbitrator in this case imposed. But the three-month suspension without pay of a commercial truck driver cannot accurately be characterized as "condonation" (Pet. Br. 41) of the employee's conduct.

B. The Courts Below Correctly Declined To Exercise De Novo Review Over The Arbitrator's Decision

Petitioner also contends that, even if the choice of an appropriate punishment for a second positive drug test requires consideration of all the facts and circumstances (rather than the application of a per se rule of discharge), the courts below ought to have exercised de novo review over the arbitrator's decision. Petitioner argues (Br. 24, 27) that judicial deference to the arbitrator's judgment is inappropriate when the arbitrator's decision potentially affects persons outside the workplace. That argument lacks merit and would, if accepted, substantially disrupt the implementation of the federal labor laws.

1. In the so-called "*Steelworkers* trilogy"—*i.e.*, *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960)—this Court emphasized the broad deference that courts owe to the decisions of labor arbitrators acting under collective bargaining agreements. The Court observed that the employer's agreement to arbitrate personnel disputes is frequently the *quid pro quo* for the union's agreement not to strike. See *American Mfg.*, 363 U.S. at 567; *Warrior & Gulf*, 363 U.S. at 578. The Court also explained that

> the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs

> and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.

Warrior & Gulf, 363 U.S. at 581.

Finally, the Court emphasized that "[w]hen an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations." *Enterprise Wheel*, 363 U.S. at 597. The Court explained that

> plenary review by a court of the merits [of the arbitrator's construction of the contract] would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final. * * * [T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

Id. at 599.[11]

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[11] The Court reaffirmed those principles in *Misco*. The Court observed that "the federal statutes regulating labor-management relations * * * reflect a decided preference for private settlement of labor disputes without the intervention of government." 484 U.S. at 37. It explained that "[b]ecause the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept." *Id.*

2. Determining the appropriate sanction in cases involving employee drug use requires the decisionmaker to assess the employee's prospects for rehabilitation in light of his overall work record and the circumstances of his positive drug test(s). It also requires an understanding of the "typical" punishment for comparable offenses (in a particular shop and/or in a broader geographic area), as well as an appreciation of other workers' likely reactions to a particular sanction. Thus, while the arbitrator's authority is drawn from the agreement of the parties, his powers under the agreement typically extend beyond contract "interpretation" narrowly conceived. See *Warrior & Gulf*, 363 U.S. at 582 ("The parties expect that [the arbitrator's] judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished."). The arbitrator's specialized training and repeated exposure to workplace disputes gives him a significant advantage (as compared to a federal judge) in resolving those issues, notwithstanding the fact that the consequences of the arbitrator's decision may be felt beyond the employer's place of business (as would be true for many types of employees, such as utility

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at 37-38. The Court noted as well that "where it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect. If the courts were free to intervene on these grounds, the speedy resolution of grievances by private mechanisms would be greatly undermined." *Id.* at 38.

workers, health care workers, food handlers, makers of many manufactured products, etc.).[12]

3. The arbitrator in this case placed substantial weight on his own observation of Smith's testimony. See Pet. App. 28a. In practically any context where the credibility of witnesses matters, reviewing courts give deference to the decisionmaker who has seen and heard the testimony firsthand. Under petitioner's theory, the district court in this case should have either made its own credibility determination based on a cold record, or conducted a new evidentiary hearing in order to assess Smith's credibility for itself. Neither alternative seems workable. Moreover, both variants appear inconsistent with this Court's statement in *Misco* that "[h]ad the arbitrator found that Cooper had possessed drugs on the property, yet imposed discipline short of discharge

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[12] Petitioner contends (Br. 40, 42) that the arbitral award is called into question by the arbitrator's failure to make an express finding that Smith is unlikely to use drugs in the future. The arbitrator stated, however, that Smith had "made a very personal appeal under oath to the arbitrator concerning a personal/family problem which caused this one time lapse in drug usage. The arbitrator found this testimony creditable." Pet. App. 28a. Although that statement is not altogether clear, it is most naturally read to mean that the arbitrator credited Smith's characterization of his drug use as a "one time lapse," as well as Smith's explanation for his misconduct. This Court has discouraged efforts to impugn arbitral awards by exploiting ambiguities in the arbitrator's opinion. See *Enterprise Wheel*, 363 U.S. at 598 ("A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award."). As we explain above, moreover, Smith's resumption of safety-sensitive duties is contingent on his successful completion of any rehabilitation program prescribed by the SAP. That independent prerequisite to reinstatement further reduces the significance of the absence of express arbitral findings concerning the likelihood of future drug use.

because he found as a factual matter that Cooper could be trusted not to use them on the job, the Court of Appeals could not upset the award because of its own view that public policy about plant safety was threatened." 484 U.S. at 45.

4. Expeditious resolution of employee grievances under a collective bargaining agreement is independently desirable. The employer and union are involved in a continuing relationship, and the goal of federal labor policy is that the relationship be as harmonious as possible. Protracted litigation over individual grievances disserves that policy. Cf. *United Parcel Serv., Inc.* v. *Mitchell*, 451 U.S. 56, 64 (1981) (collective bargaining "system, with its heavy emphasis on grievance, arbitration, and the 'law of the shop,' could easily become unworkable if a decision which has given 'meaning and content' to the terms of an agreement, and even affected subsequent modifications of the agreement, could suddenly be called into question as much as six years later").

Thus, judicial deference to arbitral decisions serves an important practical purpose regardless of whether arbitrators are better than courts at determining the appropriate sanction for breaches of workplace rules. So long as arbitrators are equally good (or even passably good) at making such judgment calls, a deferential standard helps to ensure that the arbitrator's decision will be treated when issued as essentially final, thereby allowing the parties to put the controversy behind them. Petitioner's proposed rule, by contrast, would likely result in protracted litigation in a broad range of cases. Cf. *Enterprise Wheel*, 363 U.S. at 599 ("plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final").

5. As this Court emphasized in the *Steelworkers* trilogy, the significance of arbitration clauses must be assessed in the context of the collective bargaining agreement as a whole. Such clauses further the cause of industrial peace because they have historically served as the *quid pro quo* for the union's agreement not to strike. See *American Mfg.*, 363 U.S. at 567 ("There is no exception to the 'no strike' clause and none therefore should be read into the grievance clause, since one is the *quid pro quo* for the other."); *Warrior & Gulf*, 363 U.S. at 578 ("A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement," since "arbitration is the substitute for industrial strife."); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 54 (1974) ("The primary incentive for an employer to enter into an arbitration agreement is the union's reciprocal promise not to strike.").

Under petitioner's approach, however, courts would exercise de novo review over any arbitral ruling that potentially affects the health or safety of the public, even if the parties have agreed to entrust the dispute to an arbitrator. That rule would effectively render arbitration clauses unenforceable with respect to a substantial category of workplace grievances. Petitioner urges that result despite the fact that arbitration clauses have historically been central to the maintenance of industrial peace, and despite the fact that federal labor law has broadly encouraged arbitration of disputes related to the implementation of collective bargaining agreements. See 29 U.S.C. 173(d) ("Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."). Petitioner's apparent dissatisfaction with the limited scope

of the public policy exception to enforceability of arbitration awards provides no justification for its proposed radical undermining of the finality of such awards, which would subvert federal labor policy and threaten substantial disruption of the collective bargaining process.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DAVID W. OGDEN
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor General

WILLIAM KANTER
MARK W. PENNAK
Attorneys

NANCY E. MCFADDEN
General Counsel

PAUL M. GEIER
Assistant General Counsel

PETER J. PLOCKI
Senior Attorney
Department of Transportation

JULY 2000

(9)

No. 99-1038

Supreme Court, U.S.
FILED
JUN 0 1 2000
CLERK

IN THE

Supreme Court of the United States

EASTERN ASSOCIATED COAL CORPORATION,
Petitioner,

v.

UNITED MINE WORKERS OF AMERICA, DISTRICT 17;
LOCAL 1503, UNITED MINE WORKERS OF AMERICA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

ROBERT E. WILLIAMS
Counsel of Record
ANN ELIZABETH REESMAN
MCGUINESS NORRIS & WILLIAMS, LLP
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for Amicus Curiae Equal Employment Advisory Council

June 2000

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

22pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICUS CURIAE	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. AN ARBITRATION AWARD DIRECTING THAT AN EMPLOYEE BE REINSTATED TO A SAFETY-SENSITIVE POSITION AFTER TWICE TESTING POSITIVE FOR DRUG USE VIOLATES A WELL DEFINED AND DOMINANT PUBLIC POLICY AND IS, THEREFORE, UNENFORCEABLE UNDER SECTION 301 OF THE LMRA	7
A. The Policy of Judicial Deference to Labor Arbitration Awards Does Not Require Enforcement of an Award that Contravenes A Well Defined and Dominant Public Policy	7
B. Existing Laws and Legal Precedents Establish a Well Defined and Dominant Public Policy Against Operation of Dangerous Machinery by Drug Users	8
C. A Positive Result on a Random Workplace Drug Test Requires the Conclusion that Reinstatement of the Tested Employee to a Safety-Sensitive Position Would Be Contrary to Public Policy	10

TABLE OF CONTENTS—Continued

Page

II. A RULE REQUIRING JUDICIAL ENFORCEMENT OF ANY ARBITRATION AWARD THAT DOES NOT VIOLATE POSITIVE LAW OR COMPEL CONDUCT THAT IS SPECIFICALLY ILLEGAL, EVEN IF IT CONTRAVENES AN IMPORTANT PUBLIC POLICY, WOULD HAVE DISASTROUS IMPLICATIONS FOR MANY ESSENTIAL EMPLOYER PROGRAMS, INCLUDING HARASSMENT-FREE WORKPLACE PROGRAMS, AND SHOULD BE REJECTED BY THIS COURT 12

CONCLUSION 16

TABLE OF AUTHORITIES

FEDERAL CASES — Page

Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998) 13
Chrysler Motors Corp. v. International Union, Allied Indus. Workers, 959 F.2d 685 (7th Cir.1992) 14
Communications Workers of Am. v. Southeastern Elec. Coop., 882 F.2d 467 (10th Cir. 1989)..... 14
Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l, 861 F.2d 665 (11th Cir. 1988) 9
Eastern Associated Coal Corp. v. United Mine Workers, 66 F. Supp.2d 796 (S.D. W. Va. 1998), *aff'd*, 188 F.3d 501 (4th Cir. 1999), *cert. granted*, 120 S. Ct. 1416 (2000) 5, 8, 10
Exxon Corp. v. Baton Rouge Oil & Chem. Workers Union, 77 F.3d 850 (5th Cir. 1996) 9
Exxon Corp. v. Esso Workers' Union, Inc., 118 F.3d 841 (1st Cir. 1997)..... *passim*
Exxon Shipping Co. v. Exxon Seamen's Union, 73 F.3d 1287 (3d Cir. 1996) 9
Exxon Shipping Co. v. Exxon Seamen's Union, 11 F.3d 1189 (3d Cir. 1993) 9
Exxon Shipping Co. v. Exxon Seamen's Union, 993 F.2d 357 (3d Cir. 1993) 9
Faragher v. City of Boca Raton, 524 U.S. 775 (1998) 13
Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 2
Gulf Coast Indus. Workers Union v. Exxon Co., 991 F.2d 244 (5th Cir. 1993) 9
Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993).... 13
Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986)..... 13

TABLE OF AUTHORITIES—Continued

	Page
Newsday, Inc. v. Long Island Typographical Union, 915 F.2d 840 (2d Cir. 1990)	15
Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters, 969 F.2d 1436 (3d Cir. 1992)	7, 15
Union Pac. R.R. Co. v. United Transp. Union, 3 F.3d 255 (8th Cir. 1993)	9
United Paperworkers v. Misco, Inc., 484 U.S. 29 (1987)	8, 13
United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960)	8
United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960)	7
United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960)	7-8
W.R. Grace and Co. v. Local Union 759, 461 U.S. 757 (1983)	8
Westvaco Corp. v. United Paperworkers Int'l Union, 171 F.3d 971 (4th Cir. 1999)	14
Wright v. Universal Maritime Serv. Corp., 119 S. Ct. 391 (1998)	2
STATUTES	
Drug Free Workplace Act of 1988, 41 U.S.C. § 701 (1987 & Supp. 1999)	2
Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185 (1998 & Supp. 1999)	5, 7
Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1994 & Supp. 1999)	3
42 U.S.C. § 2473c (1994 & Supp. 1999)	2
46 U.S.C. § 7702(c)(2) (1999)	2
49 U.S.C. § 20140 (1997 & Supp. 1999)	2
49 U.S.C. § 31306 (1997 & Supp. 1999)	2

TABLE OF AUTHORITIES—Continued

REGULATIONS Page

29 C.F.R. § 1604.11(d) (1999) 13

MISCELLANEOUS

EEOC Policy Guidance: Sexual Harassment, N-915-050, *reprinted in* EEOC Compl. Man. (BNA) N:4031 (March 19, 1990) 13

Stephen Buehrer, *A Clash of the Titans: Judicial Deference to Arbitration and the Public Policy Exception in the Context of Sexual Harassment*, 6 Am. U. J. Gender & L. 265 (1998) 14

IN THE

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EASTERN ASSOCIATED COAL CORPORATION,
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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae*.[1] Letters of consent from the parties have been filed with the Clerk of the Court. The brief urges reversal of the decision below and, thus, supports the position of the petitioner, Eastern Associated Coal Corporation.

[1] Counsel for the *amicus curiae* authored the brief in its entirety. No person or entity other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council ("EEAC" or the "Council") is a nationwide association of employers organized in 1976 to promote sound programs to end employment discrimination. Its membership now includes more than 325 of the nation's largest private sector companies, collectively providing employment to more than 17 million people throughout the United States.

EEAC's members all are employers covered by the Labor-Management Relations Act of 1947, 29 U.S.C. § 141 *et seq.* Many have collective-bargaining agreements and regularly use arbitration processes to settle employment-related issues. EEAC strongly supports arbitration as a means of resolving workplace disputes and has filed *amicus* briefs supporting enforcement of arbitration agreements in numerous cases. *E.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Wright v. Universal Maritime Serv. Corp.*, 119 S. Ct. 391 (1998).

EEAC's members are concerned, however, about arbitration awards—like the one in this case—that clash with important public policies, such as the policy that favors keeping known drug-abusers out of safety-sensitive jobs. Most EEAC members are government contractors subject to the Drug Free Workplace Act of 1988, as amended, 41 U.S.C. § 701. Many also are subject to laws designed to eliminate drug use in specific industries, such as commercial motor transportation, 49 U.S.C. § 31306, rail transportation, 49 U.S.C. § 20140, maritime transportation, 46 U.S.C. § 7702(c)(2), and the civil space program, 42 U.S.C. § 2473c. Accordingly, most EEAC members have drug-free workplace programs that include strong anti-drug policies backed up by training, counseling, and strict penalties for violations.

EEAC members are concerned that affirmance of the Fourth Circuit's decision in this case—which upholds enforcement of

an arbitrator's award directing an employer to reinstate a man to a job driving 55,000 pound vehicles on public roads after he had twice failed random workplace drug tests—would subvert their drug-free workplace programs and contravene the public policies on which those programs are based.

EEAC members also are concerned that affirmance of the decision below could weaken and undercut other employer programs grounded in important public policies, including programs to eliminate unlawful workplace harassment. As employers, EEAC members are, of course, subject to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and other laws against job discrimination and harassment based on sex, race and other protected characteristics. In keeping with those laws, and with the decisions of this and other courts, EEAC members have adopted harassment-free workplace programs that, like their drug-free workplace programs, include strong policies backed by training, counseling, and strict penalties. As discussed in the Argument that follows, several courts have vacated, as against public policy, arbitration awards ordering reinstatement of employees found to have engaged in workplace sexual harassment. EEAC members are concerned that supportive court decisions such as these—and, with them, the credibility of employers' harassment-free workplace programs—could be cast in doubt if this Court were to uphold the Fourth Circuit's reasoning in this case.

STATEMENT OF THE CASE

The petitioner, Eastern Associated Coal Corporation ("the Company"), is a mining company bound by a collective-bargaining agreement with the respondents (collectively, "the Union"). The agreement authorizes the Company to discharge employees for "just cause," subject to a grievance and arbitration process.

The Company employs a road crew to maintain its mine haulage roads. Crew members known as Mobile Equipment Opera-

tors ("MEO's") operate vehicles weighing up to 55,000 pounds on public roadways. The MEO's are required to have commercial drivers' licenses and are subject to Department of Transportation ("DOT") regulations requiring, among other things, that they submit to drug and alcohol testing before they first perform "safety-sensitive functions" for the Company, and randomly thereafter.

When the Company selected James Smith to fill a vacant MEO position in March 1996, it subjected him to a random drug test in accordance with the DOT regulations. Smith tested positive for the chemical ingredients of marijuana. As a result, the Company suspended and later discharged him. Smith grieved, and his case went to arbitration. No one challenged the validity of the drug test, but the arbitrator ruled that discharge was too severe. He ordered the Company to reinstate Smith to the MEO job without back pay after a 30-day suspension, and directed that Smith participate in a substance abuse program and submit to random drug testing for the next five years.

Smith passed several random drug tests after that, but in June 1997—less than 15 months after his reinstatement—he again tested positive for the ingredients of marijuana. Again, the Company suspended and then discharged him. Again, Smith grieved and the case went to arbitration.

Although the second discharge case went to a different arbitrator, the outcome was similar. No one questioned that Smith had violated the Company's anti-drug policy, but the arbitrator ordered the Company to reinstate him once again to the safety-sensitive MEO position. This time, the arbitrator required that Smith sign a resignation letter that the Company could accept if he tested positive for drugs a third time. The arbitrator said he was convinced that a "personal/family problem" had caused Smith "this one-time relapse in drug usage" and that he was "confident" that, if Smith had misled him, "the grievant will

make another misstep with drug use and be caught." Pet. App. 28a.

Not content to wait for Smith to make another "misstep with drug use," the Company brought this action under Section 301 of the Labor Management Relations Act seeking to vacate the arbitrator's award. The district court instead granted the Union's motion to enforce the award. *Eastern Associated Coal Corp. v. United Mine Workers*, 66 F. Supp.2d 796, 805 (S.D. W. Va. 1998), *aff'd*, 188 F.3d 501 (4th Cir. 1999), *cert. granted*, 120 S. Ct. 1416 (2000). Based on a review of statutes, regulations and judicial precedents, the court found that there is "a well defined and dominant public policy against the performance of safety sensitive jobs by employees under the influence of drugs," and "against the use of controlled substances by those who perform safety sensitive jobs." *Id.* at 804. The court concluded, however, that there is no public policy against *reinstating* employees to safety-sensitive positions after they have tested positive for drugs. *Id.* at 805. Consequently, the district court concluded that the public policy exception to the general federal policy of judicial deference to arbitration awards did not apply in this case. *Id.*

The court of appeals, in a per curiam order, affirmed "on the reasoning of the district court." Pet. App. 4a.

SUMMARY OF ARGUMENT

As it relates to the employment of drug users, the issue presented in this case is a narrow, albeit extremely important one. The issue is *not* whether there is a well-defined, dominant public policy against drug use by persons performing safety-sensitive jobs. Everyone agrees that there *is*. The issue, rather, is whether that policy precludes a court from enforcing an arbitrator's award directing that a person who repeatedly has failed random workplace drug tests be reinstated to a safety-sensitive job—in effect, to wait and see whether, in the words of the arbitrator in this case, he "will make another misstep with drug use."

Pet. App. 28. *Amicus* EEAC submits that the order to reinstate Smith was as much at odds with public policy as were Smith's own actions in reporting to his safety-sensitive job with drugs in his system.

Judge Selya of the First Circuit perhaps put it best. Writing for that court in *Exxon Corp. v. Esso Workers' Union, Inc.*, 118 F.3d 841, 850 (1st Cir. 1997), he observed that "the same public policy which countervails the performance of safety-sensitive tasks while under the influence of drugs also encourages (and, in some cases requires) employers to implement and enforce drug-free workplace programs which include mandatory drug testing of those in safety-sensitive posts," and that "forcing an employer to reinstate an employee who tests positive for drug use pursuant to a test that the employer administers as part of a drug-free workplace program would undermine that policy." Thus, the First Circuit rejected the "wait-and-see" approach, *id.* at 849, correctly concluding that "it would insult public policy for a court to enforce a contract that requires the ongoing employment in a safety-sensitive capacity of a worker who has scorned the employer's drug-free workplace program." *Id.* at 851.

Judicial deference to arbitration, although generally a good thing, must not be carried to the extremes the respondents advocate in this case—*i.e.*, to such lengths that it would require enforcement of an arbitrator's award that offends public policy, as long as the award does not actually violate "positive law" or compel conduct that is specifically illegal. Such uncritical deference would have disastrous consequences, not only for drug-free workplace programs, but also for other valuable programs that employers have adopted to meet their legal obligations and provide safe, nondiscriminatory work environments for their employees. For example, such unfettered deference could put courts in the untenable position of having to rubber-stamp arbitral awards restoring sexual harassers to positions in which they could resume preying upon co-workers and subordinates. As the Third Circuit has recognized, deference to arbitration in such

circumstances "undermines the employer's ability to fulfill its obligation to prevent and sanction sexual harassment in the workplace." *Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters*, 969 F.2d 1436, 1442 (3d Cir. 1992).

Public policies against drug abuse and sexual harassment in the workplace depend upon more than just proscriptive rules. They also depend upon employers' effective implementation of programs to protect workers against the dangerous and discriminatory effects of infractions by others. In this case, the district court defined the policy against workplace drug abuse too narrowly. As a result, it upheld an arbitration award that undercut the program on which the employer's drug-free workplace effort depended. We urge this Court to make clear that drug-free and harassment-free workplace programs are themselves protected by important public policies, and that arbitration awards that subvert such programs are not entitled to judicial enforcement.

ARGUMENT

I. AN ARBITRATION AWARD DIRECTING THAT AN EMPLOYEE BE REINSTATED TO A SAFETY-SENSITIVE POSITION AFTER TWICE TESTING POSITIVE FOR DRUG USE VIOLATES A WELL DEFINED AND DOMINANT PUBLIC POLICY AND IS, THEREFORE, UNENFORCEABLE UNDER SECTION 301 OF THE LMRA.

A. The Policy of Judicial Deference to Labor Arbitration Awards Does Not Require Enforcement of an Award that Contravenes a Well Defined and Dominant Public Policy.

There is no dispute that judicial review of labor arbitration awards under Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, is—and *should be*—narrowly limited. *See United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior &*

Gulf Navigation Co., 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960). Nevertheless, courts properly can—and *should*—refuse to enforce such awards when the arbitrator's interpretation of a collective-bargaining agreement would violate some "explicit public policy" that is "well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general consideration of supposed public interests.'" *W.R. Grace and Co. v. Local Union 759*, 461 U.S. 757, 766 (1983)(quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)); *see also United Paperworkers v. Misco, Inc.*, 484 U.S. 29 (1987).

B. Existing Laws and Legal Precedents Establish a Well Defined and Dominant Public Policy Against Operation of Dangerous Machinery by Drug Users.

In this case, the district court, whose reasoning the Fourth Circuit adopted, conducted the requisite analysis of statutes, regulations and court precedents, and correctly concluded that there exists a "well defined and dominant public policy against the performance of safety sensitive jobs by employees under the influence of drugs." *Eastern Associated Coal Corp. v. United Mine Workers*, 66 F. Supp.2d 796, 804 (S.D. W. Va. 1998). The court also correctly recognized the obverse—*i.e.*, that "a well defined and dominant public policy exists against the use of controlled substances by those who perform safety sensitive jobs." *Id.* From a review of the petition and the supporting and opposing briefs filed with this Court, it appears that there is no dispute about the validity of the district court's findings that these interrelated public policies exist, and that they are "well defined and dominant" within the meaning of the *W.R. Grace* and *Misco* decisions cited above.[2]

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[2] As the district court correctly noted, 66 F. Supp.2d at 804, numerous other courts also have recognized these "well defined and dominant" public

The importance of these undisputed public policies can scarcely be overstated. As the First Circuit has said:

> At this point in American history, few elements of public policy command the consensus that attaches to the policy against the use of controlled substances by those whose work potentially imperils others. Judicial decisions, agency regulations, and legislative enactments combine to form a solid phalanx of positive law evidencing a well defined and dominant public policy against the performance of safety-sensitive tasks while under the influence of drugs.

Exxon Corp. v. Esso Workers' Union, Inc., 118 F.3d 841, 849 (1st Cir. 1997).

Also uncontested are the basic facts to which these important public policies must be applied in this case. There appears to be no question that the workplace drug test the Company required employee Smith to take was a valid test, or that DOT regulations required that the test be given randomly to employees in the Company's safety-sensitive MEO positions. Nor is there any question that Smith, on at least two occasions within about 15 months, reported to work as an MEO in such condition that he was unable to pass that test.

Thus, the narrow but vital issue now presented to this Court boils down to this: Can the arbitrator's award requiring the

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policies against performance of safety-sensitive jobs by employees under the influence of drugs, and against use of controlled substances by those who perform safety-sensitive jobs. *E.g.*, *Exxon Corp. v. Esso Workers' Union, Inc.*, 118 F.3d 841, 847-49 (1st Cir. 1997); *Exxon Corp. v. Baton Rouge Oil & Chem. Workers Union*, 77 F.3d 850, 855-56 (5th Cir. 1996); *Exxon Shipping Co. v. Exxon Seamen's Union*, 73 F.3d 1287, 1292 (3d Cir. 1996); *Exxon Shipping Co. v. Exxon Seamen's Union*, 11 F.3d 1189, 1194 (3d Cir. 1993); *Union Pac. R.R. Co. v. United Transp. Union*, 3 F.3d 255, 262 (8th Cir. 1993); *Exxon Shipping Co. v. Exxon Seamen's Union*, 993 F.2d 357, 361-62, 364 (3d Cir. 1993); *Gulf Coast Indus. Workers Union v. Exxon Co.*, 991 F.2d 244, 252-53 (5th Cir. 1993); *Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 861 F.2d 665, 674 (11th Cir. 1988).

Company to reinstate Smith to the safety-sensitive MEO job after he repeatedly had failed the drug test be reconciled with the "well defined and dominant" public policies that the district court correctly identified? The district court concluded that the award *could* be reconciled with those policies, because "the DOT Regulations do not express an explicit, well defined public policy permanently enjoining the employment of commercial motor vehicle drivers who test positive for drug use." 66 F. Supp.2d at 804-5. We submit, however, that in so holding, the court took too narrow a view of the policies involved. It failed to follow those policies through to their logical conclusion, as discussed below, and thus ultimately reached a result that is at odds with both public policy and law.

C. A Positive Result on a Random Workplace Drug Test Requires the Conclusion that Reinstatement of the Tested Employee to a Safety-Sensitive Position Would Be Contrary to Public Policy.

The district judge's principal error in this case was in failing to recognize that the public policies he had correctly identified—*i.e.*, the policy against performance of safety-sensitive jobs by employees who use drugs, and the corollary policy against use of drugs by employees who perform safety-sensitive jobs—do not stand in isolation. Rather, they are dependent on the development, implementation, and effective enforcement by employers of programs to discourage workplace drug use and protect employees and the public against the dangers of drug-related workplace accidents. These vital programs are undermined and eviscerated when a worker with a history of drug abuse is reinstated to a safety-sensitive position.

The First Circuit has recognized the interdependence of drug-free workplace *policies* and the *programs* essential to their effectuation:

> The pertinent public policy dictates not only that employees refrain from performing safety-sensitive jobs while

> under the influence of drugs, but also that employers develop (and enforce) programs designed to discourage such activity. . . . [T]he same public policy which countervails the performance of safety-sensitive tasks while under the influence of drugs also encourages (and, in some cases, requires) employers to implement and enforce drug-free workplace programs which include mandatory drug testing of those in safety-sensitive posts.

Exxon Corp. v. Esso Workers' Union, Inc., 118 F.3d at 849-50. Consequently, that court concluded:

> Consistent with this enhanced understanding of the discerned public policy, we hold that forcing an employer to reinstate an employee who tests positive for drug use pursuant to a test that the employer administers as part of a drug-free workplace program would undermine that policy. It makes no sense to construe public policy as encouraging—and in some cases mandating—employers to establish and enforce drug-testing programs, yet to preclude them from taking decisive action against those employees who test positive.

Id. at 850. Several other circuit courts have reached the same correct conclusion and have, therefore, refused enforcement of arbitrators' awards ordering reinstatement of employees who had failed drug tests. *See* cases cited at footnote 2, *supra*.

As the First Circuit observed, the public policy that encourages (and in some cases, requires) employers to adopt and enforce effective drug-free workplace programs is incompatible with a "wait-and-see" approach. *Id.* at 849. In contrast, the arbitrator in this case was willing to expose employee Smith, his employer, his co-workers and the public to the risk that Smith would take a third "misstep with drug use" if reinstated to his job operating a 55,000 pound vehicle on the public roads. As the First Circuit observed, that approach is unacceptable because of the likelihood that the "misstep" will come to light through a tragic accident:

> The notorious mishap involving the Exxon Valdez, which produced vast environmental devastation, highlights the core problem associated with this "wait-and-see" approach. If we have learned anything from such catastrophes, it is that employers must act affirmatively to avoid drug-related accidents rather than wait passively for such accidents to happen.

Id. Thus, as that court recognized, it follows that "the well defined and dominant public policy which we have identified does not require an employer to await the occurrence of an accident before discharging an employee who tests positive for drug use." *Id.* It also follows, we submit, that an arbitrator's award directing that an employee who repeatedly has failed random workplace drug tests be placed back in a safety-sensitive job to wait and see whether he will make another "misstep with drug use" is contrary to public policy and should not be judicially enforced.

II. A RULE REQUIRING JUDICIAL ENFORCEMENT OF ANY ARBITRATION AWARD THAT DOES NOT VIOLATE POSITIVE LAW OR COMPEL CONDUCT THAT IS SPECIFICALLY ILLEGAL, EVEN IF IT CONTRAVENES AN IMPORTANT PUBLIC POLICY, WOULD HAVE DISASTROUS IMPLICATIONS FOR MANY ESSENTIAL EMPLOYER PROGRAMS, INCLUDING HARASSMENT-FREE WORKPLACE PROGRAMS, AND SHOULD BE REJECTED BY THIS COURT.

Insofar as it is premised on the notion that a labor arbitrator's award is entitled to judicial enforcement even if it offends public policy, as long as it does not actually violate "positive law" or require conduct that is specifically illegal, the decision below carries the fundamentally sound idea of deference to arbitration too far. While a court should not substitute its judgment for an arbitrator's based on "an assessment of 'general considerations

of supposed public interests,'" *United Paperworkers Int'l Union v. Misco*, 484 U.S. at 43 (quoting *W.R. Grace*, 461 U.S. at 766), neither should a court allow itself to be used as an instrument to subvert important public policies by weakening or countermanding mechanisms essential to their implementation.

Such unthinking deference to arbitration awards would jeopardize not only drug-free workplace programs, but also other workplace programs adopted by employers to effectuate important public policies. Of particular concern to the EEO-conscious employers represented by this *amicus* is the impact that such extreme deference to arbitration awards could have on programs to rid the workplace of unlawful harassment.

Like the public policy against allowing persons with a history of drug abuse to work in safety-sensitive jobs, there clearly exists a well-defined and dominant public policy against allowing persons with a history of sexual or racial harassment to work in positions in which they can prey upon vulnerable co-workers, subordinates and others. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993). *See also* EEOC Policy Guidance: Sexual Harassment, N-915-050, *reprinted in* EEOC Compl. Man. (BNA) N:4031 (March 19, 1990). Indeed, the EEOC Guidelines make employers liable for sexual harassment between co-workers when the employer knew or should have known of the harassment and failed to take "immediate and appropriate corrective action." 29 C.F.R. § 1604.11(d) (1999).

This Court's decisions in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), added strong encouragement to employers to adopt harassment-free workplace programs to meet their obligations under Title VII. Essential ingredients of such programs include a policy against unlawful harassment, training to ensure that employees understand the policy's meaning and consequences, and follow-up mechanisms to ensure that complaints

are investigated promptly and appropriate steps are taken to prevent recurrence of harassment when it is found.

Reinstatement of an employee who has committed egregious or repeated acts of sexual or racial harassment directly subverts public policy by impairing the environment in which innocent co-workers and subordinates must work. "[I]t subjects the victim of past harassment to the potential of on-going abuse and subjects the employer to continuing liability." Stephen Buehrer, *A Clash of the Titans: Judicial Deference to Arbitration and the Public Policy Exception in the Context of Sexual Harassment*, 6 Am. U. J. Gender & L. 265, 287-88 (1998). It also sends a signal to employees that the employer's anti-harassment policies are not to be taken seriously. Thus, reinstatement of such an individual can have devastating effects on the credibility and effectiveness of an employer's harassment-free workplace program.

Employers' concerns that excessive deference to arbitration could undermine their harassment-free workplace programs are not merely speculative, but are based on actual experience reflected in several reported court decisions. For example, in *Westvaco Corp. v. United Paperworkers Int'l Union*, 171 F.3d 971 (4th Cir. 1999), the court upheld an arbitrator's decision to reinstate an employee who repeatedly had sexually harassed a co-worker. The court reasoned that the general policy against sexual harassment was not a sufficient basis to deny enforcement of the reinstatement award.[3]

The fallacy that has led some courts to enforce arbitration awards reinstating sexual harassers is similar to the fallacy that

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[3] At least two other circuits have enforced arbitrators' awards reinstating employees discharged for violating their employers' policies against sexual harassment. *See Chrysler Motors Corp. v. International Union, Allied Indus. Workers*, 959 F.2d 685 (7th Cir. 1992); *Communications Workers of Am. v. Southeastern Elec. Coop.*, 882 F.2d 467 (10th Cir. 1989).

led the district court in this case to enforce an award reinstating a drug-abuser to a job driving 55,000 pound vehicles on the public roads. The problem lies in failing to recognize that effectuation of the public *policy* against workplace harassment (or drug use) depends on effective implementation of the employer's harassment-free (or drug-free) workplace *program*. An award that subverts the employer's *program* inevitably undermines the public *policy*, as well.

The Third Circuit noted this interrelationship between policies and programs in the context of sexual harassment in *Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters*, 969 F.2d 1436 (3d Cir. 1992), when it refused to enforce an arbitration award ordering reinstatement of an accused sexual harasser without a determination that the harassment did not, in fact, occur. The court observed that an award that "would allow a person who may have committed sexual harassment to continue in the workplace without a determination of whether sexual harassment occurred" was contrary to public policy, because it "[did] not discourage sexual harassment" but "[i]nstead, . . . undermine[d] the employer's ability to fulfill its obligation to prevent and sanction sexual harassment in the workplace." *Id.* at 1442. *See also Newsday, Inc. v. Long Island Typographical Union*, 915 F.2d 840, 845 (2d Cir. 1990) (arbitrator's award directing reinstatement of sexual harasser held unenforceable as against public policy because, "[a]bove all, it prevents [the employer] from carrying out its legal duty to eliminate sexual harassment in the work place.").

Accordingly, we urge this Court to reject the extreme position advocated by the respondents in this case—*i.e.*, that deference to labor arbitration requires enforcement of any arbitration award that does not, itself, actually violate "positive law" or compel unlawful conduct, even though the award may offend a well defined and dominant public policy that is based in law.

CONCLUSION

For the reasons stated above, the decision of the court of appeals should be reversed, and this case should be remanded with instructions to the district court to grant the employer's petition to vacate the arbitration award.

Respectfully submitted,

ROBERT E. WILLIAMS
Counsel of Record
ANN ELIZABETH REESMAN
MCGUINESS NORRIS & WILLIAMS, LLP
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for Amicus Curiae Equal Employment Advisory Council

June 2000

FILED
JUN 1 2000
OFFICE OF THE CLERK

(7)

No. 99-1038

IN THE

Supreme Court of the United States

EASTERN ASSOCIATED COAL CORPORATION,
Petitioner,

v.

UNITED MINE WORKERS OF AMERICA, DISTRICT 17;
LOCAL 1503, UNITED MINE WORKERS OF AMERICA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF EXXON MOBIL CORPORATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

JOHN F. DAUM
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, California 90071
(213) 430-6000

WALTER E. DELLINGER
(*Counsel of Record*)
WILLIAM J. STUCKWISCH
JONATHAN D. HACKER
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300

Counsel for Amicus Curiae

13pp

TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT ... 3

ARGUMENT 3

EXXONMOBIL'S UNIQUE EXPERIENCE SHOWS THE NEED FOR JUDICIAL RECONCILIATION OF THE IMPORTANT AND COMPETING PUBLIC POLICIES AT STAKE IN THE AREA OF DRUG AND ALCOHOL POLICY IN THE WORKPLACE 3

CONCLUSION 9

TABLE OF AUTHORITIES

Page(s)

CASES

EEOC v. Exxon Corp.,
203 F.3d 871 (5th Cir. 2000).....7

Flynn v. Raytheon Co.,
868 F. Supp. 383 (D. Mass. 1994).....4

OFCCP v. Exxon Corp.,
1996 WL 662445 (Dep't of Labor 1996).....6

Schmidt v. Safeway Inc.,
864 F. Supp. 991 (D. Or. 1994).....4

United Paperworkers International Union v. Misco, Inc.,
484 U.S. 29 (1987).....8, 9

United Steelworkers v. Enterprise Wheel & Car Corp.,
363 U.S. 593 (1960).....8

United Steelworkers v. Warrior & Gulf Navigation Co.,
363 U.S. 574 (1960).....8

W.R. Grace & Co. v. Local 759, International Union of Rubber Workers,
461 U.S. 757 (1983).....8, 9

Williams v. Widnall,
79 F.3d 1003 (10th Cir. 1996).....3

STATUTES

Americans with Disabilities Act, 42 U.S.C. § 12112 (1994).....4

Americans with Disabilities Act, 42 U.S.C. § 12114 (1994).....3, 4

Rehabilitation Act, 29 U.S.C. § 793 (1994).....3

TABLE OF AUTHORICITS
(continued)

Page(s)

REGULATIONS

29 C.F.R. Part 1630 app. § 1630.16(b) (2000).....3

IN THE

Supreme Court of the United States

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BRIEF OF EXXON MOBIL CORPORATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Exxon Mobil Corporation ("ExxonMobil") is a leading oil and gas company with facilities and operations throughout the world.[2] Given the nature of ExxonMobil's business, many of its employees perform jobs

[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been lodged with the Clerk of the Court. Counsel for a party did not author this brief in whole or in part, and no person or entity, other than the amicus curiae, has made a monetary contribution to the preparation and submission of this brief.

[2] Prior to November 30, 1999, Exxon Mobil Corporation was known as Exxon Corporation. On that date, it acquired Mobil Corporation, and changed its name.

that are highly safety-sensitive. ExxonMobil is committed to preventing drug and alcohol use by such employees. To that end, ExxonMobil not only has adopted a strict drug and alcohol policy but also has repeatedly gone to court to ensure that employees terminated for drug or alcohol use are not reinstated by labor arbitrators. Indeed, ExxonMobil has been a party to six of the court of appeals cases addressing whether a reinstatement award violated a well-defined and dominant public policy.[3] ExxonMobil urges the Court to confirm the power of federal courts to refuse to enforce awards that reinstate employees who test positive for drugs to safety-sensitive positions.

In addition, ExxonMobil's experience before, during, and after the highly publicized oil spill resulting from the grounding of the tanker Exxon Valdez in 1989 is an object lesson in the conflicts that can and do arise among the important and competing public policies at stake when drug and alcohol issues arise in the workplace. These policies cannot be fully reconciled, but need to be balanced on the basis of the overall public interest. Recognizing that no solution is perfect, ExxonMobil submits that the job of balancing the competing public policies is beyond the scope of responsibilities assigned to a traditional labor arbitrator and that the ultimate decision must be made by a judge authorized to determine the overall public interest.

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[3] *Exxon Corp. v. Esso Workers' Union, Inc.*, 118 F.3d 841 (1st Cir. 1997); *Exxon Corp. v. Baton Rouge Oil & Chem. Workers Union*, 77 F.3d 850 (5th Cir. 1996); *Exxon Shipping Co. v. Exxon Seamen's Union*, 73 F.3d 1287 (3d Cir. 1996); *Exxon Shipping Co. v. Exxon's Seamen's Union*, 11 F.3d 1189 (3d Cir. 1993); *Gulf Coast Indust. Workers Union v. Exxon Co.*, 991 F.2d 244 (5th Cir. 1993); *Exxon Shipping Co. v. Exxon Seamen's Union*, 993 F.2d 357 (3d Cir. 1993).

INTRODUCTION AND SUMMARY OF ARGUMENT

The question in this case is whether the Court should adopt a blanket rule that would prohibit courts reviewing arbitration awards reinstating employees in safety-sensitive positions who have tested positive for drug and alcohol abuse from considering the needs of public safety and other public interests. The answer is no, but not because there is only one uniform public policy that demands termination in every case. To the contrary, as ExxonMobil's experience shows, there are in fact *several* important and competing public policies at stake when drug and alcohol issues arise in the workplace. From its earliest federal labor arbitration cases onward, this Court has made clear that the job of balancing competing *public* policies is beyond the scope of responsibilities assigned to a traditional *private* labor arbitrator.

ARGUMENT

EXXONMOBIL'S UNIQUE EXPERIENCE SHOWS THE NEED FOR JUDICIAL RECONCILIATION OF THE IMPORTANT AND COMPETING PUBLIC POLICIES AT STAKE IN THE AREA OF DRUG AND ALCOHOL POLICY IN THE WORKPLACE.

Congress has repeatedly told employers that public policy favors the rehabilitation and treatment of employees with substance-dependency problems. Under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12114 (1994), and its predecessor the Rehabilitation Act, 29 U.S.C. § 793 (1994), employers are specifically directed to make reasonable accommodations to employees with disabilities. Courts and the enforcement agencies have held that some persons with substance dependency problems can qualify as disabled. *See Williams v. Widnall*, 79 F.3d 1003, 1005 (10th Cir. 1996) ("Alcoholism is a covered disability."); 29 C.F.R. Part 1630 app. § 1630.16(b) (2000) ("Individuals disabled by alcoholism are entitled to the same protections accorded other individuals with disabilities under [the ADA].").

The practical problem for employers in this area is that, even after drug users or alcoholics go through treatment and are rehabilitated, the nature of their illness is such that one can never be sure whether, when, or under what circumstances they may relapse. Employment in a safety-sensitive position increases the statistical risk of an accident. Yet some courts have held that requirements imposed on a recovering alcoholic for safety reasons (because of the risk of a relapse) but not on other employees discriminate based on a disability. *See, e.g., Flynn v. Raytheon Co.*, 868 F. Supp. 383, 387-88 (D. Mass. 1994) (ADA violated by policy against on-the-job intoxication enforced more strictly against an alcoholic); *Schmidt v. Safeway Inc.*, 864 F. Supp. 991, 1000, 1002 (D. Or. 1994) (discharge of alcoholic driver of 50-ton truck for showing up drunk impermissible unless company policy applied to all employees, not just alcoholics). *Compare* 42 U.S.C. §12112 (1994) *with* 42 U.S.C. § 12114(c)(4).

Prior to 1989, ExxonMobil's drug and alcohol policy was consistent with these policies. It provided that employees would not have their job security or future opportunities jeopardized due to a request for help or involvement in a rehabilitation effort. An employee who volunteered for treatment, and went through rehabilitation, was in effect guaranteed a return to the same job upon successful completion of the rehabilitation process, notwithstanding that no rehabilitation program for drug or alcohol use, however successful, can guarantee 100% that there is no risk of a relapse. Under this policy, employees were entitled to be returned to safety-sensitive positions as well as to other positions. The policy reflected a judgment that encouraging employees to seek treatment was, on balance, the best way to reduce drug and alcohol-related accidents. To be sure, in some instances accidents would occur as a result of relapses by employees who had been through apparently successful rehabilitation. But ExxonMobil thought that the risk of relapse by a rehabilitated employee was outweighed by the

risk of accidents from the much larger number of employees who would never come forth, and whose conditions would go undetected, if the price of coming forth was dismissal or transfer.

On March 24, 1989, the tanker Exxon Valdez ran aground in Prince William Sound, Alaska, spilling 258,000 barrels of crude oil. The accident was widely, although in ExxonMobil's view falsely, attributed to alcohol abuse by Captain Joseph Hazelwood,[4] who had been treated for alcohol abuse (not alcoholism) four years earlier and who had (unknown to any of his supervisors) resumed social drinking about a year before the accident.

In the aftermath of this accident, commentators pilloried ExxonMobil and its drug and alcohol policy, ignoring the policies of rehabilitation and treatment that it served and Congress had endorsed. The Department of Justice brought criminal proceedings against ExxonMobil; one of the charges was that ExxonMobil's drug and alcohol policy was criminally negligent in that it had allowed for the restoration of Captain Hazelwood to the command of a vessel following his treatment.[5] Accordingly, ExxonMobil changed its policy.

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[4] In fact, Hazelwood was not even on the bridge at the time of the grounding, but had turned over the "conn" – the active command of the vessel – to the Third Mate, after giving the latter clear instructions to turn right at a specified point. If those instructions had been carried out, the grounding would not have occurred. As Admiral Yost, the Commandant of the United States Coast Guard, has testified, "[t]he primary cause . . . of that grounding was a perfectly qualified third mate on the bridge of a ship that, through a period of a few minutes' inattention to duty . . . ran the ship aground on a clear night with all the navigational aids watching him." Trial Transcript (May 27, 1994) at 2177:13-19, *In re the Exxon Valdez*, No. 89-095-Civ (D. Alaska).

[5] Bill of Particulars, filed July 31, 1990, at 19, ¶ 3(c), *United States v. Exxon Corporation, et al.*, No. A90-015-1CR (D. Alaska).

ExxonMobil's new policy precludes any employee who has had problems with substance abuse from serving in any safety-sensitive position. Had this policy been in effect when Captain Hazelwood reported his problem, he would not have been restored to his position as captain of a tanker, but would have been given some non-safety-sensitive position. When ExxonMobil ultimately reached a plea bargain with the United States, the Justice Department praised the new policy, and urged the Court to remit any fine to be imposed on the ground that the new policy ensured that employees with histories of alcohol or drug abuse could not occupy safety-sensitive positions.[6] As expressed by the Department of Justice, the public policy of the United States was that safety and environmental concerns outweighed both the desirability of rehabilitation and treatment and the policy against discrimination against employees with a history of alcohol or drug abuse.

Notwithstanding this apparently definitive statement of public policy, and notwithstanding the praise of ExxonMobil's new policy by the Department of Justice, other agencies of the federal government balanced the relevant public policies differently. The Office of Federal Contract Programs Compliance ("OFCCP") challenged ExxonMobil's new policy as a violation of the Rehabilitation Act, arguing that it unlawfully discriminated against employees with the disability of alcoholism. *OFCCP v. Exxon Corp.*, 1996 WL 662445 (Dep't of Labor 1996). In its administrative opinion in that case, the Department of Labor specifically took ExxonMobil to task for subordinating one of the goals behind ExxonMobil's *old* policy – encouraging employees to seek rehabilitation – to safety concerns. The Equal Employment Opportunity Commission ("EEOC") also questioned the new policy. It sued ExxonMobil under the

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[6] Government's Memorandum in Aid of Sentencing, filed Sept. 30, 1991, at 10; Reporter's Transcript of Change of Plea Hearing, October 8, 1991, at 31. *United States v. Exxon Corporation, et al.*, No. A90-015-1CR (D. Alaska).

ADA, arguing that excluding recovering substance abusers from safety-sensitive positions could be justified only by proof that the excluded employees posed a "direct threat" to the health or safety of other individuals in the workplace. The district court agreed with the EEOC, and only this year did ExxonMobil succeed in persuading the Fifth Circuit that this ruling was wrong. *EEOC v. Exxon Corp.*, 203 F.3d 871 (5th Cir. 2000). The matter has now been remanded for consideration of the EEOC's other challenges to ExxonMobil's policy.

While litigation against ExxonMobil by the Department of Labor and the EEOC was pending, the question of ExxonMobil's culpability for the oil spill was submitted to an Alaska jury in federal district court in Anchorage. Plaintiffs' counsel told the jury that ExxonMobil's old alcohol policy had been reckless because it did not forbid the return to a job as tanker captain of any person with a history of alcohol abuse. Recklessness, in other words, was predicated on ExxonMobil's failure to adopt the very policy that the Department of Labor and the EEOC considered illegal. The jury awarded $5 billion in punitive damages against ExxonMobil; ExxonMobil's appeal from the judgment is currently pending in the Ninth Circuit.

The point of this history is not to argue about whether ExxonMobil's policy was right then, or is right now,[7] or whether the policies expressed by the Department of Justice in 1991, or the contrary policies expressed by the OFCCP and the EEOC in 1996, reflect the "true" public policy of the United States. It is not even to argue whether a rational judicial system can allow a jury to award billions of dollars in punitive damages for an employer's failure to have a policy that two federal agencies consider illegal. The point is rather that there are many public policies in this area, and

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[7] ExxonMobil believes that *both* of its policies reflect reasonable alternative choices, in a difficult area, and that neither policy should be cause for the imposition of liability.

that they are very difficult to reconcile. Federal agencies are in conflict. Employers do their best to guess right, and are subject to millions or billions of dollars in punitive damages if plaintiffs' lawyers can persuade a jury that they have guessed wrong. Even judges do not always agree about what is right.

ExxonMobil submits that the delicate and difficult task of reconciling competing *public* policies is too important to be left to a labor arbitrator who by definition is not charged with ascertaining the true public interest from among conflicting public policies. This is a task for a court, as the Court has repeatedly held. *See United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 42 (1987) ("the public's interests in confining the scope of private agreements to which it is not a party *will go unrepresented* unless the judiciary takes account of those interests when it considers whether to enforce such agreements" (emphasis added)); *W.R. Grace & Co. v. Local 759, Int'l Union of Rubber Workers*, 461 U.S. 757, 766 (1983) ("the question of public policy is ultimately one for resolution by the courts").

This is not to say that arbitrators are jurisdictionally excluded from consideration of the public interest. In determining whether an employer has "just cause" under the terms of a collective bargaining agreement to terminate an employee who poses a safety risk, an arbitrator can and should consider the public interest in safety and accident-avoidance. But the fact remains that a labor arbitrator emphatically "is *not* a public tribunal." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960) (emphasis added) (internal quotation marks omitted). "He has no general charter to administer justice for a community which transcends the parties. He is rather part of the system of self-government created by and confined to the parties." *Id.* (internal quotation marks omitted). *See also United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960) (arbitrators "sit to settle disputes at the plant level"); *id.* at 597 (arbitrator's authority "is confined to

interpretation and application of the collective bargaining agreement"). Under the *Steelworkers Trilogy*, private labor arbitrators are presumed best situated to resolve run-of-the-mine, "common law of the shop" disputes confined to the parties' private collective bargaining relationship, and are given near-conclusive authority over such disputes. But when it comes to the public interest, *W.R. Grace* and *Misco* make clear that *courts*, not private arbitrators, are the ultimate authority on questions of public policy. That is true when public policy is clear. And it is even more so when, as in this area, several different and important public policies are in conflict.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below and hold that courts have the authority, under the public policy exception to traditional deference to labor arbitration awards, to refuse to enforce awards reinstating to safety-sensitive positions employees who test positive for drugs or alcohol.

Respectfully submitted,

JOHN F. DAUM
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, California 90071
(213) 430-6000

WALTER E. DELLINGER
(*Counsel of Record*)
WILLIAM J. STUCKWISCH
JONATHAN D. HACKER
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300

Counsel for Amicus Curiae

SUPREME COURT, U.S.
FILED
JUN 1 2000
OFFICE OF THE CLERK

No. 99-1038

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICI CURIAE* AIR TRANSPORT ASSOCIATION OF AMERICA, *et al.* IN SUPPORT OF PETITIONER

JOHN J. GALLAGHER
Counsel of Record
NEAL D. MOLLEN
PAUL, HASTINGS, JANOFSKY & WALKER LLP
1299 Pennsylvania Avenue, N.W.
Tenth Floor
Washington, DC 20004-2400
(202) 508-9500

Attorneys for Amici Curiae Air Transport Association of America, Airline Industrial Relations Conference and Regional Airline Association

160076

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Interests of the *Amici Curiae*	1
Summary of Argument	4
Argument	7
I. Under Misco An Arbitration Award Can Be Vacated On Public Policy Grounds Even If Enforcing The Award Would Not Require Unlawful Conduct.	7
II. The Decision Adopted Below Leaves Important Public Interests Entirely Unprotected And Threatens The Health And Safety Of The Public.	12
A. The Arbitrator And The Lower Courts Failed To Consider The Public Interest In Safety	13
B. High Rates Of Recidivism By Substance Abusers Make The Court's Exclusively Prospective Focus Unwarranted	13
C. The Courts Must Have The Authority To Vacate Any Arbitration Award That Is Inconsistent With The Employer's Duty To Public Safety	15
Conclusion	19

TABLE OF CITED AUTHORITIES

Page

Cases:

A.C. Frost & Co. v. Couer D'Alene Mines Corp., 312 U.S. 38 (1941) 8, 11

Cole v Burns Int'l Security Servs., 105 F.3d 1465 (D.C. Cir. 1997) 13

Coupe v. Federal Express Corp., 121 F.3d 1022 (6th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998) 15

Delta Air Lines, Inc. v. Air Line Pilots Assn., Intern., 861 F.2d 665 (11th Cir. 1988), *cert. denied*, 493 U.S. 871 (1989) 4

EEOC v. American Airlines, 48 F.3d 164 (5th Cir. 1995) 15

Hurd v. Hodge, 334 U.S. 24 (1948) 7, 10

Johnson v. American Airlines, 745 F.2d 988 (5th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985) 16

Marshall v. Baltimore & Ohio R.R., 16 How. 314 (1850) 9, 11

Montauk-Caribbean Airways v. Hope, 479 U.S. 872 (1986) 2

Cited Authorities

Page

Murnane v. American Airlines, 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982) .. 15

Muschany v. United States, 324 U.S. 49 (1945) ... 8

New England Legal Foundation v. Massachusetts Port Auth., 883 F.2d 157 (1st Cir 1989) 2

Newton v. Rumery, 480 U.S. 386 (1987) 5, 10, 11

Northwest Airlines v. ALPA, 808 F.2d 76 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1014 (1988) ..1, 2, 4, 16

Railway Labor Exec. Ass'n v. National Mediation Bd., 29 F.3d 655 (D.C. Cir. 1994) 2

Robinson v. American Airlines, 908 F.2d 1020 (D.C. Cir. 1990) 16, 18

Steele v. Drummond, 275 U.S. 199 (1927) 8, 9, 11

Sutton v. United Airlines, 527 U.S. 471 (1999) ... 1

Twin City Pipe Line Co. v. Harding Glass Co., 283 U.S. 353 (1931) 8

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Cited Authorities

Page

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W.R. Grace & Co. v. Local Union Rubber Workers, 461 U.S. 757 (1983) 3, 4, 5, 7, 8

Statutes:

49 U.S.C. § 44701(b) 2, 3, 15, 17

49 U.S.C. § 44701(d) 17

Regulations:

14 C.F.R. Part 121, App. J. (V)(B) 14

14 C.F.R. § 121.383(a)(1)-(3) 16

35 Fed. Reg. 9217 (1970) 18

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59 Fed. Reg. 42922 (Aug. 19, 1994) 17

Page

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A National Evaluation Of Treatment Outcomes For Cocaine Dependence, 56 Archives of General Psychiatry 506-14 (1999) 14

Effect, On Application Of 28 U.S.C. § 1404(a) Or Forum Non Conveniens In Diversity Case, Of Contractual Provision Fixing Forum For Enforcement Or Laws Governing Interpretation — Post-Bremen Cases, 123 A.L.R. Fed. 323 ... 9, 10

Enforceability of Restrictive Covenant, Ancillary To Employment Contract, As Affected By Duration Of Restriction, 41 A.L.R.2d 15 (1997) 9

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Liability Insurance Coverage As Extending To Liability For Punitive Or Exemplary Damages, 16 A.L.R.4th 11 9

Restatement (Second) of Contracts § 178 9

Restatement (Second) of Contracts § 179, comment (b) 5, 9

17A Am. Jur. 2d *Contracts* § 257 9

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Page

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Treatment of Alcoholism, Part 1, Harvard Mental Health Letter, No. 11, Vol. 16 (May 1, 2000) . . 14

INTERESTS OF THE *AMICI CURIAE*[1]

1. The Air Transport Association of America ("ATA") is a membership organization comprised of twenty-three U.S. certificated air carriers. ATA's members account for more than 97% of the domestic passenger and cargo traffic flown annually by U.S. air carriers and employ over half a million people.[2]

ATA regularly represents the interests of its member carriers in legislative, judicial and administrative matters, and has filed numerous *amicus* briefs in federal and state court proceedings concerning a broad variety of aviation-related issues. ATA has previously participated as *amicus curiae* in this Court in *Sutton v. United Airlines*, 527 U.S. 471 (1999); *Northwest Airlines v. Air Line Pilots Association*, 486 U.S. 1014 (1988). ATA also works closely with the various Federal agencies that regulate airline safety such as the Federal Aviation Administration and the Department of Transportation.

2. Airline Industrial Relations Conference ("AIRCON") is a voluntary membership association of United States scheduled air carriers. AIRCON was formed to facilitate the exchange of ideas and information concerning personnel and labor relations issues in the airline industry, and to represent

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1. No counsel for either party authored this brief, either in whole or in part. No entity other than the *amici* and their members made any monetary contribution to the preparation or submission of this brief. Petitioner and Respondent have consented to the filing of this brief. Letters indicating their consent have been filed with the Clerk of this Court.

2. ATA's members are Airborne Express, Alaska Airlines, Aloha Airlines, America West Airlines, American Airlines, American Trans Air, Atlas Air, Continental Airlines, Delta Air Lines, DHL Airways, Emery Worldwide, Evergreen International, Federal Express, Hawaiian Airlines, Midwest Express Airlines, Northwest Airlines, Polar Air Cargo, Reeve Aleutian Airways, Southwest Airlines, Trans World Airlines, United Airlines, United Parcel Service, and US Airways. Associate members are Aerovias de Mexico, Air Canada, Canadian Airlines International, KLM-Royal Dutch Airlines, and Mexicana de Aviacion.

the member carriers with respect to related legislative, judicial and administrative matters. AIRCON has previously participated as *amicus curiae* in a number of matters before this Court including *Northwest Airlines v. Air Line Pilots Association*, 486 U.S. 1014 (1988).

3. The Regional Airline Association ("RAA") represents U.S. regional airlines and the suppliers of products and services that support the industry, before the courts, the United States Congress, the Federal Aviation Administration, Department of Transportation and other federal and state agencies to promote a healthy business climate for its members and to work with regulatory agencies and other organizations, including the traveling public, with an objective of achieving safety, efficiency and growth of the regional airlines. The 60 airline members of RAA transport 97 percent of all regional airline passengers. RAA has participated as *amicus curiae* in a number of cases in this and other federal courts including *Montauk-Caribbean Airways v. Hope*, 479 U.S. 872 (1986); *Railway Labor Exec. Ass'n v. National Mediation Bd.*, 29 F.3d 655 (D.C. Cir. 1994); and *New England Legal Foundation v, Massachusetts Port Auth.*, 883 F.2d 157 (1st Cir 1989).

4. ATA, AIRCON, and RAA (collectively "*Amici*") are vitally concerned about the safety of commercial air transportation. This concern does not arise merely from "general considerations of supposed public interests,"[3] but from an explicit and unambiguous statutory command that obliges all air carriers to operate with the "highest possible degree of safety in the public interest." 49 U.S.C. § 44701(b).

The lower courts' opinion in this case,[4] and the misunderstanding of law from which it stems, represent significant impediments to the ability of air carriers to fulfill

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3. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987) (citations omitted).

4. The Fourth Circuit's brief *per curiam* order adopted the reasoning of the district court as its own.

that statutory command. In the view of the lower courts here, this Court's opinions in *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987), and *W.R. Grace & Co. v. Local Union Rubber Workers*, 461 U.S. 757 (1983), deprived the federal courts of their common law authority to vacate an arbitration decision that violates well-defined and dominant public policy unless that policy explicitly "make[s] it illegal" to enforce the award. Pet. App. 21a.

As this Court noted in *Misco*, only the courts can safeguard the public's interests when asked to enforce private agreements which implicate the health and safety of the public at large. 484 U.S. at 42. These public interests "will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements." *Id.* The courts below abdicated that responsibility, and in doing so adopted a legal standard so narrow that it literally threatens the lives and safety of the traveling public.

Amici are in a unique position to explain to the Court how the lower courts' untenable interpretation of *Misco* impedes the airline industry's efforts to provide "highest possible degree of safety in the public interest." 49 U.S.C. § 44701(b). The Department of Transportation's mandatory drug and alcohol testing protocols apply to more than 200,000 employees of ATA member companies. In 1998, ATA members conducted more than 83,000 drug tests and more than 23,000 alcohol tests under the DOT's procedures. *Amici*, therefore, are particularly concerned that any standard adopted by the Court in this case account for the fact that the intensity of the public's interest in a drug-free workforce is not uniform as to all industries and sectors of the economy, and that the specific statutory obligations of air carriers make application of the narrow public policy standard adopted below particularly inappropriate.[5]

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5. There is disagreement in the circuits about whether public policy allows arbitrators to return pilots who have flown while intoxicated, (Cont'd)

SUMMARY OF ARGUMENT

1. "As with any contract, . . . a court may not enforce a collective bargaining agreement that is contrary to public policy." *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766 (1983). Because an arbitration award rendered under a collective agreement interprets and enforces the agreement, the same public policy standard applies when a party seeks to vacate or enforce such an award. *Id.* The authority to deny enforcement of arbitration awards which violate public policy "is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law *or* public policy." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 42 (1987) (emphasis added).

2. The courts below read the foregoing quote from *Misco* in the conjunctive rather than the disjunctive, finding themselves to be without authority to vacate an arbitration award unless implementation of the award would cause the employer to violate the law.[6] This constricted reading of the public policy exception to the enforceability of arbitration awards is not supported either by the Court's opinion in *Misco* or by the common law rule of which *Misco* was merely an

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and other known substance abusers, to service in safety sensitive positions. *See Northwest Airlines v. ALPA*, 808 F.2d 76 (D.C. Cir. 1987) (enforcing arbitration award for reinstatement of pilot who flew while intoxicated), *cert. denied*, 486 U.S. 1014 (1988); *compare Delta Air Lines, Inc. v. Air Line Pilots Assn., Intern.*, 861 F.2d 665 (11th Cir. 1988) (applying *Misco* public policy exception to deny reinstatement to airline pilot who flew while intoxicated), *cert. denied*, 493 U.S. 871 (1989).

6. "*Because the DOT Regulations do not make it illegal to reinstate employees who test positive for drug use*, it cannot be said that the DOT Regulations 'specifically militate against the relief ordered by the arbitrator' in this case." Op. of district court, Pet. App. 21a (emphasis added).

application.[7] Federal courts have historically refused enforcement of many contracts found to violate dominant and well-established public policies, even where no law would affirmatively proscribe implementation of the agreement.[8]

3. This Court has repeatedly held that a contract "is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Newton v. Rumery*, 480 U.S. 386, 392 (1987).[9] *Misco* made clear that the courts can and must consider the health and safety of the public at large, and, relying upon *W.R. Grace*, defined the framework for that consideration. Thus, the courts below had both the authority and the responsibility to determine whether the arbitrator's risk-reward calculus was consistent with public policy.

Under the lower courts' reading of *Misco*, however, there is no place for the exercise of judicial judgment: if an arbitration award can be implemented without causing the employer to break the law, it must be enforced even if the result is incompatible with an obvious public policy expressed unambiguously in statutes, regulations or judicial precedents. Such an approach abdicates the courts' responsibility to recognize and to consider the public interest.

4. Even under the correct legal standard, the lower court's analysis of public policy interests here was myopic. While acknowledging "a well defined and dominant public policy

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7. Indeed, the Court in *Misco* expressly declined to reach that very issue. 484 U.S. at 45 n.12.

8. *See* cases cited *infra* at n.12; *see also* Restatement (Second) of Contracts § 179, comment (b) (court "may refuse to enforce a term on grounds of a judicially developed public policy even though there is no contravention of the legislation").

9. *See also W.R. Grace*, 461 U.S. at 766 ("the question of public policy is ultimately one for resolution by the courts").

against drug use by persons employed as commercial motor vehicle drivers," Pet. App. 20a, the courts below ignored both the punitive and deterrent features of that policy, simply because neither Congress nor the Department of Transportation had the foresight to make it expressly unlawful to order reinstatement of a recidivist substance abuser. Under this reasoning, the public is put at risk whenever the legislature or the regulators lack either the foresight or the resources to prohibit expressly all conceivable forms of employee misconduct.

5. This case presents an excellent example of the sort of arbitral mischief the lower courts' reasoning condones. The grievant, James Smith, operated vehicles weighing more than 25 tons on public highways, and apparently did so with marijuana in his system on more than one occasion. In overturning his discharge, the arbitrator acknowledged that the grievant had engaged in serious misconduct, that the grievant was a recidivist, that the employer had "very real" concerns about returning the grievant to the roads, and that the company's desire to terminate the grievant was entirely "understandable." Pet. App. 27a. Nonetheless, the arbitrator ordered reinstatement because the arbitrator had sympathy for the grievant's "personal/family problem" and because the arbitrator was comforted by the conviction that if he had been "misled by the grievant," "the grievant will make another misstep with drug use and be caught." Pet. App. 28a.[10] The arbitrator treated the grievance entirely as a private workplace dispute, making no mention at all of the risks the grievant's conduct created for innocent members of the traveling public. Thus, the arbitrator was willing to accept the risk — to co-workers, and to the driving public — that the grievant might be "caught" only as a result of a tragic accident involving grievant, his 25-ton vehicle, and some unknowable number of innocent victims.

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10. *See United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) (arbitrator is not to dispense "his own brand of industrial justice").

6. The standard adopted by the lower courts here is inimical to well-defined and dominant public safety considerations. That standard should be explicitly rejected by this Court. *Amici* do not seek to give federal courts unchecked authority to police arbitration awards for "general considerations of supposed public interests."[11] *Misco* condemns such an approach, because it would undermine important policies of federal labor law, and the effectiveness of arbitration for achieving labor peace. Nonetheless, when public safety is implicated, the courts must retain, and prudently exercise, the authority to consider the public's interests — interests which "will go unrepresented unless the judiciary takes [them into] account." *Misco*, 484 U.S. at 42. This case thus presents the mirror image of *Misco*, where the lower court was too eager to deny enforcement of an arbitration award. Here, the lower courts felt so constrained by their narrow reading of *Misco* that they failed to engage in the careful analysis expressly required by *Misco* and *W.R. Grace* and the longstanding public policy doctrine upon which those decisions were based.

ARGUMENT

I. UNDER MISCO AN ARBITRATION AWARD CAN BE VACATED ON PUBLIC POLICY GROUNDS EVEN IF ENFORCING THE AWARD WOULD NOT REQUIRE UNLAWFUL CONDUCT.

The federal courts have an affirmative obligation to refuse to enforce any private agreement that violates public policy.[12]

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11. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987) (citations omitted).

12. *See, e.g.*, *Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948) ("The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States . . . Where the enforcement of private agreements would be violative of [public] policy, it is the obligation of courts to refrain from such exertions of judicial

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"As with any contract . . . a court may not enforce a collective-bargaining agreement that is contrary to public policy." *W.R. Grace*, 461 U.S. at 766. "A court's refusal to enforce an arbitrator's award under a collective-bargaining agreement because it is contrary to public policy is [merely] a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or pubic policy." *Misco*, 484 U.S. at 42.[13]

The lower courts here, however, read *Misco*'s public policy exception as a significant limitation on this common law authority. They erred in doing so. As explained below, this fundamental error led the courts below to default on their obligation to evaluate carefully the public policy issues presented.

The ultimate rationale of the courts below was expressly stated: "*Because the DOT Regulations do not make it illegal to reinstate employees who test positive for drug use*, it cannot be said that the DOT Regulations 'specifically militate against the relief ordered by the arbitrator' in this case" Pet. App. 21a (citation omitted, emphasis added). In other words, because no statute made reinstatement expressly unlawful,

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power."); *Steele v. Drummond*, 275 U.S. 199, 204 (1927); *Marshall v. Baltimore & Ohio R.R.*, 16 How. 314 (1850). *Newton v. Rumery*, 480 U.S. 386, 392 (1987) ("a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement"); *Muschany v. United States*, 324 U.S. 49, 66 (1945); *A.C. Frost & Co. v. Couer D'Alene Mines Corp.*, 312 U.S. 38, 44 (1941) ("contracts in contravention of public policy are not enforceable"); *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 356 (1931) (same).

13. For purposes of the public policy exception, labor agreements and arbitration awards are not subject to standards different from other contracts; they are to be treated just like "any contract." *W.R. Grace*, 461 U.S. at 766.

the court held that reinstatement cannot be against public policy. This rationale is flawed for at least four reasons.

First, the courts below substantially understated the scope of their own authority under *Misco*. In *Misco*, the Court stated that "a court may refuse to enforce contracts that violate law *or* public policy," expressly using the disjunctive word "or." 484 U.S. at 42 (emphasis added). Thus, a demonstration that *either* a violation of law *or* a violation of public policy is present should suffice to void the award. *See Steele v. Drummond*, 275 U.S. 199, 204 (1927) and *Marshall v. Baltimore & Ohio R.R.*, 16 How. 314 (1850) (courts have authority to refuse to enforce agreements "to do an act that is illegal; *or* which is inconsistent with sound morals or public policy") (emphasis added).[14]

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14. *See also* Restatement (Second) of Contracts §§ 178, 179 comment (b) (courts "may refuse to enforce a term on grounds of a judicially developed public policy even though there is no contravention of . . . legislation"); 17A Am. Jur. 2d *Contracts* § 257 ("It is not necessary to have a statute to prohibit a contract which is against public policy; in such a case, public policy itself prohibits it"). Other courts have refused to enforce contractual agreements on public policy grounds in a variety of contexts even in the absence of a demonstration that the agreement violated any statute. Many states, for example, refuse to enforce agreements insuring against punitive damage liability because to do so would assertedly license the insured to engage in reckless conduct. *See Liability Insurance Coverage As Extending To Liability For Punitive Or Exemplary Damages*, 16 A.L.R.4th 11 (collecting cases). Courts routinely modify or refuse to enforce covenants not to compete where the duration or geographic scope of the agreement would unreasonably restrict the promisor's ability to earn a living. *See Enforceability of Restrictive Covenant, Ancillary To Employment Contract, As Affected By Duration Of Restriction*, 41 A.L.R.2d 15 (1997) (collecting cases). Courts also refuse to enforce some contractual forum-selection provisions because to do so would assertedly violate public policy. *See Effect, On Application Of 28 U.S.C. § 1404(a) Or Forum Non Conveniens In Diversity Case, Of Contractual Provision Fixing Forum*

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The Court has considered the public policy doctrine in contract enforcement in a wide variety of circumstances, but has never suggested that only a positive violation of law would suffice to render an agreement unenforceable. Indeed, in *Hurd v. Hodge*, 334 U.S. 24 (1948), for example, the Court assumed, for purposes of an alternative holding, that it would not directly violate any statute for the courts of the District of Columbia to enforce racially discriminatory covenants, but nonetheless concluded that the covenants could not be enforced because to do so would offend the public policy of the United States as expressed in statutes and the Constitution. 334 U.S. at 34-36.

Second, although *Misco* directed lower courts to look to judicial decisions, as well as to statutes, as a basis for determining when enforcement of an arbitration award would violate public policy, the court of appeals in this case concluded that an arbitration award becomes unenforceable only when it is proscribed by a statute. *Misco* clearly contemplated that the lower courts would be called upon to protect well-defined public policies expressed in judicial decisions by enforcing those policies in ways and contexts that the courts and legislatures had not yet addressed.

Third, this Court's decisions describe a balancing test for evaluating the merits of a public policy claim; the approach adopted by the lower courts here is incompatible with that process. As the inquiry was framed in *Newton v. Rumery*, 480 U.S. 386 (1987), a court confronted with a public policy argument must ask whether "the interest in . . . enforcement is outweighed . . . by a public policy harmed by enforcement of

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For Enforcement Or Laws Governing Interpretation — Post-Bremen Cases, 123 A.L.R. Fed. 323. In each of these instances, courts have examined the relevant statutes and judicial precedents and found that the contractual provisions at issue undermined well defined and dominant public policies. They have reached this conclusion even though enforcement of the provision would not have been "illegal."

the agreement." *Id.* at 392. Thus, "whether a contract shall be enforced require[s] consideration of the broad purposes of relevant statutes and the probable effect [of enforcement] upon this." *A.C. Frost*, 312 U.S. at 44. The zero-sum equation adopted by the courts below however, pretermits this analytical process. If implementation of an award would violate the law, the award is "illegal" and cannot be implemented regardless of countervailing interests. Conversely, under the lower courts' ruling here, despite the presence of a "well defined and dominant public policy against the performance of safety sensitive jobs by employees under the influence of drugs" (Pet. App. 18a), if no law would be violated by implementation of the award, the court's work is at an end; the award must be enforced. This approach reduces the courts' role under the public policy exception to a ministerial function. Such an approach cannot be reconciled with the balancing process this Court repeatedly has found to be "imperative."[15]

Fourth, the courts below erred by ignoring the punitive and deterrent aspects of the public policy the acknowledged, but found insufficient to vacate the award. While there is certainly a public policy favoring collective bargaining and arbitration, that policy has never been held to trump all other public policies — especially those dealing with public safety. Under the reasoning of the courts below, every labor arbitration award must be enforced unless the legislature or the regulators have had the resources and the foresight to address expressly every conceivable permutation of employee misconduct that may arise.[16]

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15. *Steele v. Drummond*, 275 U.S. 199, 204 (1927) (*quoting Marshall v. Baltimore & Ohio R.R.*, 16 How. 314 (1850).

16. Under the rationale adopted below, for example, a court would have no authority to vacate an arbitration award reinstating a day care worker who had been found guilty of child molestation or distributing child pornography unless the legislature had thought to outlaw reinstatement in precisely those circumstances. Because no rational day care center would ever conceive of hiring such an employee, it is unlikely that the legislature would think to proscribe reinstatement.

If, as this Court has repeatedly held, "the question of public policy is ultimately one for the courts," the rationale adopted by the lower courts here represents an unacceptable abdication of responsibility. Like the arbitrator, the lower courts here simply left the real public interest, and public safety, out of its analysis.

II. THE DECISION ADOPTED BELOW LEAVES IMPORTANT PUBLIC INTERESTS ENTIRELY UNPROTECTED AND THREATENS THE HEALTH AND SAFETY OF THE PUBLIC.

Even if *Misco* were not controlling here, important public interests would nonetheless support reversal of the decision below. No one could seriously dispute that the public has a compelling interest in preventing persons under the influence of drugs or alcohol from operating dangerous commercial vehicles on public roads (or from flying commercial aircraft), and a related interest in deterring such conduct before it occurs. Congress, the federal government agencies, and the legislatures of all 50 states have implemented rules to protect the public safety in this regard. Indeed, the courts below were compelled to acknowledge that "[t]here is a plentitude of positive law to support the existence of a well defined and dominant public policy against the performance of safety sensitive jobs by employees under the influence of drugs [or by employees who have] merely test[ed] positive for drugs . . . ." Pet. App. 18a-19a.

Nonetheless, the courts below felt obliged to enforce the award because reinstatement was not expressly unlawful under these numerous federal or state regulations. This rationale is flawed because: (1) it eliminates public safety from the equation, unless every aspect of public safety has been written into a positive law that relates directly to the reinstatement of employees; (2) it ignores the best available evidence regarding recidivism in substance abuse; and (3) it underestimates both the difficulty and importance of managing safety risks to innocent members of the public travelling on the highways and other forms of transportation.

A. The Arbitrator And The Lower Courts Failed To Consider The Public Interest In Safety

In this case, the arbitrator acknowledged the very real concerns petitioner had in returning respondent to his safety-sensitive position, and conceded the possibility that he had been "misled by the grievant." Pet. App. 28a. In sympathy for the domestic problems the grievant had recently experienced, however, the arbitrator decided to return the grievant to the roads. The arbitrator expressly acknowledged the possibility that he had made the wrong decision, but expressed confidence that, if that were so, "the grievant will make another misstep with drug use and be caught." Pet. App. 28a. The arbitrator treated the grievance entirely as a private workplace dispute; his decision makes no mention at all of the public interest in avoiding the risk that other innocent persons would be the real victims of the grievant's next "misstep."

That failure alone warrants refusal to enforce the arbitration award. Arbitration decisions simply must be held to a higher standard of review when important public interests are involved in an otherwise private grievance between employee and employer; otherwise there is a great risk that those public interests will be submerged or ignored, as happened here. *Cf. Cole v Burns Int'l Security Servs.*, 105 F.3d 1465, 1486-87 (D.C. Cir. 1997) (public interest requires higher standard of review for arbitration awards based on public law claims).

B. High Rates Of Recidivism By Substance Abusers Make The Court's Exclusively Prospective Focus Unwarranted

The most recent studies of substance abuse recidivism underscore the danger of the lower courts' approach.[17] For example, recent clinical trials of a new drug intended to help alcoholics quit drinking trumpeted results that showed a 38%

17. The brief filed in this case by the Institute for a Drug-Free Workplace contains a far more extensive analysis of the problem of substance abuse recidivism.

relapse rate among those receiving the drug; this compared favorably to the 60% relapse rate for the control group.[18] Similarly, a national study of treatment modalities for cocaine dependence reported that in the year following treatment, 23.5% were using cocaine again at least on a weekly basis, and an additional 18% had returned to another drug treatment program.[19]

The inclination of arbitrators to give grievants a second — or third or fourth — chance may be, in many circumstances, appropriate; in most cases the dispute will be an entirely private matter between the grievant and the bargaining parties. Where a recidivist substance abuser benefits from this sort of lenity, however, and is placed back in a safety sensitive position as a result, the public's interest becomes paramount. It was error for the courts below to fail to consider this interest.[20]

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18. *Treatment of Alcoholism, Part 1*, Harvard Mental Health Letter, No. 11, Vol. 16 (May 1, 2000) (available on LEXIS, NEWS library, CURNEWS file).

19. *See A National Evaluation Of Treatment Outcomes For Cocaine Dependence*, 56 Archives of General Psychiatry 506-14 (1999). Unfortunately, the statistics do not begin to describe the problem. Take for example the case of Sam Epps, a light-rail train operator for the Maryland Department of Transportation. Epps tested positive for drugs in 1994, and "successfully" completed an employer-mandated rehabilitation program. In February, 2000, Epps lost consciousness while driving a train and crashed into a barrier. Twenty two passengers were taken to the hospital. Investigation following the accident confirmed that Epps had taken cocaine, codeine, and a prescription pain killer before driving the train. *See Transportation Industry Maintains Anti-drug Focus: Tests, Rehabilitation Used To Ensure A Sober Workforce*, The Baltimore Sun, at 1B (February 27, 2000).

20. The FAA has recognized the poor success rate for alcohol treatment programs by barring recidivists from certain safety sensitive positions. 14 C.F.R. Part 121, App. J. (V)(B).

C. The Courts Must Have The Authority To Vacate Any Arbitration Award That Is Inconsistent With The Employer's Duty To Public Safety

Many employers, including petitioner, have obligations to public safety, and to worker safety, and may face civil tort liabilities if errant employees violate those obligations. *Amici* wish to call the Courts' attention to the exceptionally high safety standards imposed on them by law.

The Federal Aviation Act obligates air carriers to operate with the "highest possible degree of safety in the public interest." 49 U.S.C. § 44701(b). The D.C. Circuit vividly described the carrier's obligations in *Murnane v. American Airlines*, 667 F.2d 98 (D.C. Cir. 1981) (emphasis added), *cert. denied*, 456 U.S. 915 (1982):

> The safe transportation of its passengers is the essence of [the commercial air carrier's] business . . . . [T]he airline industry is one in which safety is of the utmost importance. The staggering death tolls and resulting human suffering which have followed some of our nation's horrible air disasters attest to this fact. Therefore, in our judgment, *the airline industry must be accorded great leeway and discretion in determining the manner in which it may be operated most safely. Courts, in our view, do not possess the expertise with which, in a cause presenting safety as the critical element, to supplant their judgments for those of the employer.*

Id. at 101 (emphasis added; internal citations omitted).[21]

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21. *See also Coupe v. Federal Express Corp.*, 121 F.3d 1022, 1025 (6th Cir. 1997) ("We know, moreover, that [operating with] the 'highest degree of safety in the public interest' is 'reasonably necessary' to Federal Express's aircraft operations — for Congress has said so"), *cert. denied*, 523 U.S. 1020 (1998); *EEOC v. American Airlines*, 48 F.3d 164, 170-71 (5th Cir. 1995) (*quoting* extensively, and with approval,

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The standard adopted by the lower courts in this case is incompatible with the safety obligations of airline employers. The risks are illustrated by *Northwest Airlines v. Air Line Pilots Ass'n*, 808 F.2d 76 (D.C. Cir. 1987), where the D.C. Circuit also applied this standard of review and affirmed an arbitration award reinstating an alcoholic pilot who had endangered the lives and safety of his passengers and fellow crew members by flying drunk. The arbitrator in that case concluded that the airline was obligated to reinstate the pilot automatically once he was granted a license to fly by the FAA. The court gave short shrift to the Federal Aviation Act's safety imperative, concluding that because it would not be illegal for the airline to employ the grievant as a pilot once he had his license back, then the airline was obligated to do so.[22]

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Murnane's conclusions regarding court's inability to second guess carrier's standards when related directly to operational safety); *Robinson v. American Airlines*, 908 F.2d 1020, 1023 (D.C. Cir. 1990) ("airline . . . must be accorded great leeway and discretion in determining the manner in which it may be operated *most safely*") (emphasis in original; internal citation omitted); *Johnson v. American Airlines*, 745 F.2d 988, 993 (5th Cir. 1984) (holding that "[c]ourts simply do not possess the expertise with which to supplant [the airline's] judgment" with respect to safety issues), *cert. denied*, 472 U.S. 1027 (1985).

22. The D.C. Circuit's central premise was badly mistaken: an FAA-issued pilot's license does not automatically satisfy the airline's obligations to achieve the "highest possible degree of safety." Rather, the carrier has an obligation to confirm that each of its pilots "holds an appropriate current airman certificate," "has any required . . . medical certificate[ ]," *and* "[i]s *otherwise* qualified for the operation for which he is to be used." 14 C.F.R. § 121.383(a)(1)-(3) (emphasis added). Thus an FAA decision to issue a medical certificate to a pilot after completing rehabilitation does not constitute a regulatory confirmation that the pilot is able to engage in flying of any particular variety, or relieve the carrier of its *independent* obligation to confirm that the pilot "[i]s *otherwise* qualified for the operation for which he is to be used," *i.e.*, able to, and likely to exercise consistently the judgment and discretion of a commercial airline pilot in a responsible manner.

To the extent that this analysis has any validity outside the airline industry, it is simply incompatible with the Federal Aviation Administration's regulatory scheme. That framework depends expressly on the agency's understanding that "*employers* will exercise responsible judgment in determining whether employees not expressly barred from service [by the FAA's rules] should be permitted to perform other safety sensitive duties." 59 Fed. Reg. 42922 (Aug. 19, 1994) (emphasis added).

Thus, the FAA relies on the fact that commercial airlines will impose even more stringent standards than does the agency for the most safety sensitive jobs. The Federal Aviation Act distinguishes expressly between the air carriers' obligation to maintain the *highest* standard, and the FAA's lesser obligation to set "*minimum*" standards. 49 U.S.C. § 44701(b), (d) (1998).[23]

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23. As explained in the FAA Air Transportation Operations Inspector's Handbook, the higher standard to which a carrier is held obligates the carrier to take safety precautions irrespective of the FAA's minimum standards:

> The FAA . . . has the duty, as authorized by 49 U.S.C., subtitle VII, § 40101, ["Aviation Programs"] to establish *minimum* standards, rules, and national policy which provide adequately for national security and safety in air commerce. . . .
>
> 49 U.S.C. § 44701 specifies that, when prescribing standards and regulations and in issuing certificates, the FAA shall give full consideration "to the duty resting upon air operators to perform their services with the *highest* possible degree of safety in the public interest . . ." In other words, 49 U.S.C. charges the FAA with the responsibility of promulgating and enforcing *adequate* standards and regulations. At the same time, 49 U.S.C. recognizes that holders of air operator certificates have a direct responsibility of providing air transportation with the *highest* possible degree of safety. The meaning of 49 U.S.C. § 44701(b), should be clearly understood. *It means that*

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Federal courts have recognized that the Federal Aviation Act expects air carriers to set standards higher than the minimums promulgated by the FAA:

> [T]hat [an airline's medical] criteria exceed the FAA's minimum requirements is irrelevant. An airline is free to impose more stringent requirements, and "must be accorded great leeway and discretion in determining the manner in which it may be operated *most safely*."

Robinson v. American Airlines, 908 F.2d at 1023 (*quoting Murnane*, 667 F.2d at 101) (emphasis in original).[24]

The FAA's minimum standards, then, offer no safe harbor for airlines in a given situation; their responsibilities for risk management are appreciably greater. As this Court has observed:

> The uncertainty implicit in the concept of managing safety risks always makes it "reasonably necessary" to err on the side of caution in a close case. The employer cannot be expected to establish the risk of an airline accident "to a certainty, for certainty would

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> *this duty (or responsibility) rests directly with the air operator, irrespective of any action taken or not taken by an individual FAA inspector or the FAA.*

FAA Air Transportation Operation's Inspector's Handbook, DOT publication no. 8700.10 CHG 16, at 2-8 (Dec. 22, 1997) ("FAA Handbook") (emphasis added). *See also* FAA Handbook at 2-8 (FAA "has the duty to establish minimum standards . . ."; "safety standards applicable to air transportation (air carriers) are more stringent than standards applicable to persons or organizations not involved in common carriage").

24. In fact, the FAA has specifically stated that its own rule regarding consumption of alcohol by crew members (which prohibits consumption within an eight hour period prior to takeoff) is "a 'rock bottom' minimum," 35 Fed. Reg. 17,036 (1970), and that "an excellent rule is to allow twenty-four hours between the last drink and the takeoff time." 35 Fed. Reg. 9217 (1970).

> require running the risk until a tragic accident would prove that the judgment was sound."

Western Air Lines v. Criswell, 472 U.S. 400, 419-20 (1985). Thus, it would be error — and an error that could lead to tragic results — for a court to assume that the public's interest in maintaining the safest possible air transportation system is adequately served by a determination that no positive command prohibited enforcement of an arbitration award returning a recidivist substance abuser to an airplane cockpit, or another safety sensitive position. The standard adopted by the lower courts here would have precisely that result, and the Court should repudiate that standard.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

JOHN J. GALLAGHER
Counsel of Record
NEAL D. MOLLEN
PAUL, HASTINGS, JANOFSKY
& WALKER LLP
1299 Pennsylvania Avenue, N.W.
Tenth Floor
Washington, DC 20004-2400
(202) 508-9500

Attorneys for Amici Curiae
Air Transport Association of America,
Airline Industrial Relations Conference
and Regional Airline Association

MOTION FILED
MAY - 4 2000

(9)

No. 99-1038

In The
Supreme Court of the United States
October Term, 1999

EASTERN ASSOCIATED COAL CORPORATION,
Petitioner,

v.

UNITED MINE WORKERS OF AMERICA, DISTRICT 17;
LOCAL 1503, UNITED MINE WORKERS OF AMERICA,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF *AMICUS CURIAE*, THE INSTITUTE FOR A DRUG-FREE WORKPLACE, IN SUPPORT OF THE PETITIONER

PETER A. SUSSER
Counsel of Record
MARK A. DE BERNARDO
KATHERINE A. GOETZL
LITTLER MENDELSON, P.C.
1225 I Street, N.W., Suite 1000
Washington, D.C. 20005
(202) 842-3400

Counsel for Amicus Curiae,
The Institute for a
Drug-Free Workplace

34pp

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Rule 37.3 of this Court, the Institute for a Drug-Free Workplace ("the Institute"), by its undersigned counsel, hereby moves for leave to file its brief as an *amicus curiae* in support of Petitioner, Eastern Associated Coal Corporation.* In support of its Motion, the Institute states:

The Institute is a non-profit coalition of private businesses and business organizations dedicated to

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* Prior to filing this Motion, the Institute sought the consent of the parties to the filing of its brief, as required by Rule 37.3 of this Court. The Petitioner consented to the Institute's request. The Institute was unable to contact the Respondents, necessitating this Motion.

promoting and protecting the interests of employers and employees in effective and responsible drug-abuse prevention programs.

In this regard, the Institute disseminates information to assist in the development of workplace drug-abuse prevention and treatment programs, and participates in various forums – including legal, regulatory, and legislative forums – on the development of the law on workplace substance-abuse prevention throughout the United States. The Institute has developed an enormous collection of resources on current laws, regulations, and workplace policies and practices regarding substance-abuse prevention. In addition, the Institute has extensive information on the successes and failures of workplace substance-abuse programs and what measures have proven most effective.

The Institute believes that its *amicus curiae* participation will benefit the Court in this proceeding. The Institute and its members bring a unique "hands-on" perspective to the consideration of the efficacy and value of meaningful workplace drug-testing programs. Its members have implemented such programs and applied them to sizable portions of the nation's work force and, thus, have substantial experience with the benefits of effective programs. Accordingly, the Institute and its members can provide important input on the critical policy issues involved in this case which the Court should consider.

WHEREFORE, the Institute for a Drug-Free Workplace respectfully requests that the Court grant its motion and permit it to file the accompanying brief as an *amicus curiae* in support of the Petitioner.

Respectfully submitted,

PETER A. SUSSER
Counsel of Record
MARK A. DE BERNARDO
KATHERINE A. GOETZL
LITTLER MENDELSON, P.C.
1225 I Street, N.W., Suite 1000
Washington, D.C. 20005
(202) 842-3400

Counsel for Amicus Curiae,
The Institute for a
Drug-Free Workplace

May 4, 2000

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS* 1

INTRODUCTION AND SUMMARY 3

ARGUMENT 5

I. PUBLIC POLICY DICTATES THAT DRUG- OR ALCOHOL-ABUSING EMPLOYEES NOT BE PERMITTED TO WORK IN SAFETY-SENSITIVE POSITIONS 5

A. The U.S. Supreme Court Has Recognized the Public Policy Against Employing Drug or Alcohol Abusers in Safety-Sensitive Positions 6

B. The Executive and Legislative Branches of the Federal Government Have Recognized the Public Policy Against Employing Drug or Alcohol Abusers in Safety-Sensitive Positions 6

C. State Legislatures and Courts Have Recognized the Public Policy Against Employing Drug or Alcohol Abusers in Safety-Sensitive Positions..... 8

II. PROHIBITING REINSTATEMENT OF SAFETY-SENSITIVE EMPLOYEES WHO FAIL DRUG TESTS IS A LOGICAL AND NECESSARY APPLICATION OF THE PUBLIC POLICY WHICH GIVES PRIORITY TO WORKPLACE, PUBLIC, AND ENVIRONMENTAL SAFETY 10

A. Reinstatement of Employees Who Fail Drug or Alcohol Tests Violates an Established Public Policy Because It Drastically Undermines Employer Efforts to Prevent the Placement of Substance Abusers in Hazardous Positions..... 10

B. Employers with Effective Substance-Abuse Prevention Programs Terminate Employees Who Twice Test "Positive" for Illicit Drug Use..... 15

C. Alcoholism and Drug Addiction Are Chronic Conditions for Which the Risk of Relapse Never Disappears..... 16

D. Reinstatement of a Safety-Sensitive Employee Who Failed a Drug Test Sends the Wrong Message to Courts, Arbitrators, Employers, and Employees Regarding a Compelling Public Policy..... 18

III. REVERSAL OF THE FOURTH CIRCUIT'S DECISION IS NECESSARY TO PREVENT FUTURE DRUG- AND ALCOHOL-RELATED WORKPLACE TRAGEDIES..... 20

CONCLUSION..... 22

TABLE OF AUTHORITIES

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Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l, 861 F.2d 665 (11th Cir. 1988) 10
Eastern Associated Coal Corp. v. United Mine Workers of America, No. 98-2527, 1999 WL 635632 (4th Cir. Aug. 20, 1999) 10
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Tennessee Valley Auth. v. Tennessee Valley Trades and Labor Council, 184 F.3d 510 (6th Cir. 1999) 10
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10 C.F.R. Part 707 (2000) 8

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**On Writ of Certiorari to the
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for the Fourth Circuit**

BRIEF OF *AMICUS CURIAE*, THE INSTITUTE FOR A DRUG-FREE WORKPLACE, IN SUPPORT OF THE PETITIONER

INTEREST OF THE *AMICUS*[1]

The Institute for a Drug-Free Workplace (the "Institute") is a non-profit coalition of major businesses and business organizations dedicated to promoting and protecting the interests of employers and employees in effective and

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[1] The Institute hereby certifies, in accordance with Rule 37.6 of this Court, that no counsel for a party authored this brief in whole or in part, and no person or entity, other than the Institute for a Drug-Free Workplace, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

responsible drug-abuse prevention programs. The Institute includes in its membership many of the largest employers in the United States, and a wide range of companies of all sizes, chambers of commerce, trade associations, and community coalitions.

Among other functions, the Institute disseminates information to assist in the development of workplace drug-abuse prevention and treatment programs, and to positively influence the national, state, and local consideration of drug-abuse prevention issues. The Institute is uniquely positioned to provide relevant and helpful information on the nature and dangers of substance abuse, and on the design and implementation of effective policies and procedures to combat those problems in the workplace, particularly where such policies promote the safety and welfare of employees, their co-workers, and the public at large.

The Institute has a significant interest in the questions presented in this case. By holding that an arbitration award reinstating an employee, who has repeatedly tested "positive" for illegal drug use, to a safety-sensitive position does *not* violate public policy, the U.S. Court of Appeals for the Fourth Circuit has failed to recognize the increased likelihood that the employee's drug-related impairment could cause or contribute to an accident and the potentially catastrophic consequences of such an accident. The decision inappropriately and unjustifiably undermines employers' ability to provide safe workplaces, and to take necessary steps to protect life, property, and the environment.

The Institute's members have a strong interest in ensuring that the disciplinary component of their drug-free workplace policies cannot be evaded by employees who – like the employee in this case – claim to have temporarily relapsed into illegal drug use because of a "personal/family problem." A policy of mandatory reinstatement of a safety-

sensitive employee who tested "positive" for marijuana, if not reversed by this Court, would drastically diminish the positive deterrent effect that drug-free workplace programs have on employee substance abuse.

INTRODUCTION AND SUMMARY

The Fourth Circuit's decision to uphold the arbitrator's award reinstating former employee James Smith ("Mr. Smith") violates the well-established public policy against allowing drug-impaired employees to work in safety-sensitive positions. As the First, Third, Fifth, Eighth, and Eleventh Circuits have recognized, prohibiting reinstatement of safety-sensitive employees who have tested "positive" for illicit drug use is a logical and necessary application of that public policy. That public policy – grounded in concerns relating to public, environmental, and workplace safety – is of overriding importance, and requires that the Fourth Circuit's decision be reversed.

Petitioner's employee, Mr. Smith, was a Mobile Equipment Operator. That position required a Commercial Driver's License, and thus Mr. Smith was subject to drug and alcohol testing under the U.S. Department of Transportation's regulations. In addition, Petitioner's drug-free workplace policy requires all employees to submit to random drug testing. Petitioner's policy provided that a driver who tests "positive" for illegal drugs will be removed from any safety-sensitive position and subject to disciplinary action up to and including termination.

In March 1996, Mr. Smith tested "positive" for marijuana, and Petitioner suspended him with the intent to discharge him. Mr. Smith grieved Petitioner's action. An arbitrator reinstated Mr. Smith on the condition that he participate in a substance-abuse treatment program and

submit to random drug testing for the following five years. Less than a year and a half after his first "positive" test, Mr. Smith tested "positive" for marijuana again. Petitioner suspended Mr. Smith, who grieved the impending discharge through his union, the Respondents in this case. The arbitrator reinstated Mr. Smith, finding credible his testimony that "a personal/family problem… caused this one time lapse in drug usage." Seemingly acknowledging the danger of reinstating Mr. Smith, the arbitrator noted "[i]f the arbitrator was misled by the grievant, the arbitrator is confident that the grievant will make another misstep with drug use and be caught."

Petitioner filed a lawsuit to vacate the arbitration award in the U.S. District Court for the Southern District of West Virginia, which ruled that the arbitration decision be enforced. Petitioner appealed that decision to the U.S. Court of Appeals for the Fourth Circuit, which affirmed the District Court's decision. Petitioner requested rehearing and rehearing *en banc*, which were denied.

The same safety concerns that motivated the widespread adoption of workplace drug-testing policies, particularly for employees working in safety-sensitive positions, support a broad public policy against reinstating employees who have failed drug tests to safety-sensitive positions. Reinstatement to a safety-sensitive position violates public policy by compromising multiple, compelling safety interests. Such a conclusion clearly violates public policy by undermining the myriad requirements that lawmakers and employers have adopted to ensure that substance abusers are not employed in these positions. Despite this well-defined public policy against reinstatement of safety-sensitive employees who have tested "positive," the Fourth Circuit upheld the reinstatement of Mr. Smith to his safety-sensitive position. If this arbitration had been held in the First, Third, Fifth,

Eighth, or Eleventh Circuit, the award would have been vacated.

For these reasons, the Institute urges this Court to recognize that public policy forbids the reinstatement of substance abusers to safety-sensitive positions, and to reverse the decision of the Fourth Circuit.

ARGUMENT

I. PUBLIC POLICY DICTATES THAT DRUG- OR ALCOHOL-ABUSING EMPLOYEES NOT BE PERMITTED TO WORK IN SAFETY-SENSITIVE POSITIONS.

This Court, the Executive Branch, the Legislative Branch, numerous lower federal courts, and state legislatures and courts have articulated a consistent and forceful legal doctrine that to permit safety-sensitive employees to engage in illicit drug and alcohol use – including reporting to work with a detectable amount of drugs or alcohol in one's system – would violate public policy.

A clearly defined and dominant public policy supports the removal of potentially drug- or alcohol-impaired workers from safety-sensitive positions. This policy has been expressed explicitly again and again through a large volume of federal court decisions, Executive Orders, federal legislation, federal regulations, state court decisions, and state legislation.

A. The U.S. Supreme Court Has Recognized the Public Policy Against Employing Drug or Alcohol Abusers in Safety-Sensitive Positions.

This Court, in *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989), and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), recognized the public policy against allowing impaired employees to work in safety-sensitive positions – such as the one Mr. Smith held at Eastern Associated Coal Corporation.

In *Skinner*, this Court held that in light of the great potential harm that drug- or alcohol-impaired employees may cause in the railroad industry, railroad employees could be required to undergo drug and alcohol testing, despite the Constitutional prohibition against the government conducting unreasonable searches of individuals.

Similarly, in *Von Raab*, this Court held that U.S. Customs agents who carry firearms could be subject to mandatory drug testing because of the dangers associated with the possible impairment of agents in these positions.

B. The Executive and Legislative Branches of the Federal Government Have Recognized the Public Policy Against Employing Drug or Alcohol Abusers in Safety-Sensitive Positions.

The policy against employing substance abusers in safety-sensitive positions also has been incorporated into federal law by the Executive and Legislative Branches. Executive Order 12,564, issued by President Reagan in 1986, mandated that the heads of all executive agencies of the federal government establish a drug-free workplace program.

In 1988, Congress enacted the Drug-Free Workplace Act, which requires federal contractors and grantees to establish a

drug-abuse prevention program including education, counseling, and penalties for drug use. 41 U.S.C. § 702(a) (1994).

Congress next enacted (by wide vote margins in both the Senate and the House of Representatives) the Omnibus Transportation Employee Testing Act of 1991, 49 U.S.C. § 5331 (1997). Pursuant to this law, the Department of Transportation, through its five operating agencies, established mandatory substance-abuse prevention requirements for 8.1 million workers in safety-sensitive, transportation-related positions in the private sector (including, of course, Mr. Smith's position). The Federal Aviation Administration ("FAA"), the Research and Special Projects Administration ("RSPA"), the Federal Railroad Administration ("FRA"), the Federal Highway Administration ("FHWA"), and the Federal Transit Administration ("FTA") promulgated detailed regulations in this area, all of which reflect the policy judgment that no drug- or alcohol-impaired employees should work in safety-sensitive positions in transportation operations – and all of which require the *removal* of employees who test "positive" from such positions.[2]

The Department of Energy ("DoE") and Department of Defense ("DoD") also have issued regulations to ensure that safety-sensitive jobs are not performed by drug abusers. DoE and DoD contractors must have programs to identify those who engage in illicit drug use, including testing of

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[2] *See* 14 C.F.R. Part 121, Appendices I and J (2000) (FAA); 49 C.F.R. Part 199 (1999) (RSPA); 49 C.F.R. Part 219 (1999) (FRA); 49 C.F.R. Part 382 (1999) (FHWA); 49 C.F.R. Parts 653 and 654 (1999) (FTA).

employees who perform sensitive functions – that is, functions that pose dangers to public health and safety.[3]

C. State Legislatures and Courts Have Recognized the Public Policy Against Employing Drug or Alcohol Abusers in Safety-Sensitive Positions.

A vast majority of the states also have recognized this public policy in one way or another. Many state legislatures have enacted statutes encouraging and rewarding employers who implement drug-free workplace programs including drug testing, by disqualifying substance abusers from receiving unemployment and workers' compensation benefits.

For example, 24 state unemployment compensation statutes explicitly deny unemployment benefits to workers who were dismissed due to alcohol or drug use.[4] In the absence of an explicit statutory provision, unemployment commissions in many other states faced with a worker

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[3] See 10 C.F.R. Part 707 (2000); 48 C.F.R. Part 252.223-7004 (1999); *see also* 48 C.F.R. Part 1852 (1999) (National Aeronautics and Space Administration drug-testing requirements for contractors); 10 C.F.R. Part 26 (2000) (Nuclear Regulatory Commission drug-testing requirements for nuclear plant employees).

[4] *See, e.g.*, ALA. CODE § 25-4-78 (Supp. 1998); ARIZ. REV. STAT. § 23-619.01 (1993); CAL. UNEMP. INS. CODE § 1256.5 (West Supp. 1999); FLA. STAT. ANN. § 443.101 (West 1997 & Supp. 1999); GA. CODE ANN. § 34-8-194 (Michie 1998); LA. REV. STAT. ANN. § 23:1601(10) (West Supp. 1999); VA. CODE ANN. § 60.2-618(2)(b) (Michie 1998); W. VA. CODE § 21A-6-3 (1996).

dismissed for drug or alcohol use have denied claims for unemployment benefits.[5]

Similarly, 45 states have enacted explicit statutory limitations on the receipt of workers' compensation benefits by an employee who is injured due to his or her own drug or alcohol use.[6] In the absence of statutory provisions for automatic denial of benefits, state courts have denied alcohol- and/or drug-impaired employees these benefits.[7]

While these statutes and rulings vary by state, the policy is manifestly clear in each case: employees should *not* be permitted to recover compensation for job loss or for injury when they intentionally endanger themselves and others by using drugs and alcohol.

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[5] *See, e.g., Risch v. State*, 879 P.2d 358 (Alaska 1994); *Clevenger v. Employment Sec. Dep't*, 770 P.2d 866 (Nev. 1989); *Warren v. Employment Sec. Dep't*, 724 P.2d 227 (N.M. 1986).

[6] *See, e.g.*, ALA. CODE § 25-5-51 (1992); CAL. LAB. CODE § 3600 (West 1989 & Supp. 1999); FLA. STAT. ANN. § 440.09 (West 1993); GA. CODE ANN. § 34-9-17 (1998); LA. REV. STAT. ANN. § 23:1081 (West 1998); MISS. CODE ANN. § 71-3-7 (1995); TEX. LAB. CODE ANN. §§ 406.032 & 401.013 (West 1996); VA. CODE ANN. § 65.2-306 (Michie 1995); W. VA. CODE § 23-4-2 (Supp. 1998).

[7] *See, e.g., Parro v. Industrial Comm'n of Illinois*, 657 N.E.2d 882 (Ill. 1995).

II. PROHIBITING REINSTATEMENT OF SAFETY-SENSITIVE EMPLOYEES WHO FAIL DRUG TESTS IS A LOGICAL AND NECESSARY APPLICATION OF THE PUBLIC POLICY WHICH GIVES PRIORITY TO WORKPLACE, PUBLIC, AND ENVIRONMENTAL SAFETY.

The First, Third, Fifth, Eighth, and Eleventh Circuits all have ruled that arbitration awards reinstating employees who have tested "positive" for illicit drug use to safety-sensitive positions violate public policy.[8] However, the Second, Fourth, Sixth, Ninth, and Tenth Circuits have reached the opposite conclusion.[9]

A. Reinstatement of Employees Who Fail Drug or Alcohol Tests Violates an Established Public Policy Because It Drastically Undermines Employer Efforts to Prevent the Placement of Substance Abusers in Hazardous Positions.

Employers with safety-sensitive operations hire from a population in which nearly three-quarters of America's illicit

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[8] *See Exxon Corp. v. Esso Workers' Union, Inc.*, 118 F.3d 841 (1st Cir. 1997); *Exxon Shipping Co. v. Exxon Seamen's Union*, 11 F.3d 1189 (3d Cir. 1993); *Exxon Corp. v. Baton Rouge Oil & Chem. Workers Union*, 77 F.3d 850 (5th Cir. 1996); *Union Pac. R.R. Co. v. United Transp. Union*, 3 F.3d 255 (8th Cir. 1993); *Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 861 F.2d 665 (11th Cir. 1988).

[9] *See IBEW, Local 97 v. Niagara Mohawk Power Corp.*, 143 F.3d 704 (2d Cir. 1998); *Eastern Associated Coal Corp. v. United Mine Workers of America*, No. 98-2527, 1999 WL 635632 (4th Cir. Aug. 20, 1999); *Tennessee Valley Auth. v. Tennessee Valley Trades and Labor Council*, 184 F.3d 510 (6th Cir. 1999); *United Transp. Union v. Union Pac. R.R. Co.*, 116 F.3d 430 (9th Cir. 1997); *Kennecott Utah Copper Corp. v. Becker*, 195 F.3d 1201 (10th Cir. 1999).

drug users are employed.[10] The U.S. Department of Health and Human Services has estimated that one out of every four Americans is directly affected by the alcohol or drug dependency of a family member, friend, or co-worker.[11]

Companies with employees who perform safety-sensitive tasks must be able to decrease the likelihood of accidents which have substantial – and sometimes tragic – human, economic, and environmental costs.

In addition, these companies have a statutory duty under the Occupational Safety and Health Act to ensure safe and healthy workplaces for all of their employees. 29 U.S.C.A. § 654 (a)(1) (1999).

Furthermore, employers are liable in tort to individuals who suffer personal injury and/or property damage as a result of an accident. When catastrophic events occur due to drug or alcohol use by employees in safety-sensitive positions, the financial consequences can be staggering.

Thus, companies clearly need to be able to reduce the likelihood of accidents, not only because of the severe economic burden that the company would face in the wake of such an accident, but also because of the human suffering and harm that is a realistic threat.

Drug and alcohol use are known to substantially impact workplace safety. For example, drug-using employees were

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[10] According to the most recent government figures, 73 percent of all current illicit drug users are employed. Substance Abuse and Mental Health Services Administration, U.S. Department of Health and Human Services, *1998 National Household Survey on Drug Abuse* (Aug. 1999).

[11] U.S. Department of Health and Human Services, *National Drug Survey Results Released with New Youth Public Education Materials* (Sept. 12, 1995).

found to be 3.6 times more likely to be involved in a workplace accident than are employees who do not use drugs.[12] In addition, a Utah Power and Light study estimated that employees testing "positive" on drug tests were five times more likely to be involved in a vehicle accident than those who tested "negative."[13]

Studies also show that workplace fatalities are frequently attributable to employee drug and alcohol use. An analysis of truck drivers killed in over-the-road vehicle accidents found that 33 percent of the drivers had detectable concentrations of psychoactive drugs or alcohol in their systems.[14] In addition, illicit drugs or alcohol were found in one-sixth of workers who were fatally injured in 1992.[15]

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[12] Thomas E. Backer, *Strategic Planning for Workplace Drug-Abuse Problems*, National Institute on Drug Abuse, at 4 (1987).

[13] Dennis J. Crouch, et al., *A Critical Evaluation of the Utah Power and Light Company's Substance Abuse Management Program: Absenteeism, Accidents, and Costs*, Drugs in the Workplace: Research and Evaluation Data, National Institute on Drug Abuse, at 169, 186 (1989); *see also Occupational Health Programs React As Some Employees Decide Drug Testing Doesn't Work*, Occupational Health Management, Mar. 1994, at 33 (employees who tested "positive" for drugs are 60 percent more likely to be responsible for plant accidents than those who have not); David L. Durbin, *Alcohol Consumption and Workplace Accidents*, NCCI Digest, Dec. 1991, at 39 (five states with the highest alcohol consumption have 33 percent higher average workers' compensation costs).

[14] Dennis J. Crouch, et al., *Prevalence of Drugs and Alcohol in Fatally Injured Truck Drivers*, 38 J. Forensic Sci. 1342 (1993).

[15] William M. Marine and Tracy Jack, *Analysis of Toxicology Reports from the 1992 Census of Fatal Occupational Injuries*, Compensation and Working Conditions, Oct. 1994, at 2; *see also* Glenna Kay Twing, *Working High: When Employees Take Hits, So Do Profits*, Journal of Property Management, Nov.-Dec. 1995,

Given the magnitude of the nation's drug- and alcohol-abuse problem, it would be naive to assume that employees in safety-sensitive positions do not abuse drugs or alcohol. In fact, the latest drug-test "positive" figures show otherwise: 4.8 percent of the 5.7 million employees and applicants who were tested for drugs at SmithKline Beecham laboratories in 1998 tested "positive."[16]

Of more direct relevance, out of more than 650,000 drug tests performed by that one commercial laboratory on safety-sensitive transportation workers, 3.4 percent tested "positive" for illegal drug use. That percentage indicates that *at least* 22,100 individuals in safety-sensitive jobs in the transportation industry who *knew* they were subject to drug testing *still* tested "positive" for illicit drug use.

Furthermore, in a national survey of employees, 35 percent of full-time employees interviewed by the Gallup Organization said they had "personally seen or heard of" illicit drug use on the job, and 43 percent said that drug use in their workplace "seriously affects their ability to get the job done."[17] In addition, 59 percent agreed that alcohol abuse is a major workplace problem.

Studies have documented declines in workplace accidents after substance-abuse problems were reduced or eliminated through workplace drug testing. For example, a survey of construction industry companies revealed that

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at 20 (up to 40 percent of industrial fatalities can be attributed to substance abuse).

[16] SmithKline Beecham, *SmithKline Beecham Drug Testing Index* (Mar. 16, 1999).

[17] *Survey of 1,006 Full-Time Employees, Aged 18 and Older, Working Outside of the Home,* conducted for the Institute for a Drug-Free Workplace by the Gallup Organization, Princeton, New Jersey (Nov. 1995).

where substance-abuse testing was implemented, workplace accidents declined by 34 percent.[18] In addition, Utah Power & Light experienced 27 percent fewer vehicle accidents in the first year that employees were subject to drug testing and 31 percent fewer vehicle accidents the next year.[19]

Studies of workers who test "positive" for drug use establish that the costs of workplace substance abuse can be cut by implementation of substance-abuse detection programs. For example, the U.S. Postal Service and Georgia Power Company found that they could have saved $105 million and $1.7 million, respectively, by discharging employees who failed drug tests.[20]

Legislators, regulators, and employers have relied on this information and similar data in formulating policies and strategies to protect the public from these well-documented risks. If arbitrators and courts effectively mandate that a safety-sensitive employee who tests "positive" for illegal drugs *twice* should be reinstated, they will frustrate the underlying purposes of these laws, regulations, and policies, and place the public at much greater risk.

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[18] National Association of Plumbing-Heating-Cooling Contractors, *The Construction Industry Survey on Substance Abuse* (April 1992).

[19] Dennis J. Crouch, et al., *A Critical Evaluation of the Utah Power and Light Company's Substance Abuse Management Program: Absenteeism, Accidents, and Costs*, Drugs in the Workplace: Research and Evaluation Data, National Institute on Drug Abuse, at 169, 187 (1989).

[20] United States Postal Service, Personnel Research & Development Branch, Office of Selection and Evaluation, *Preemployment Drug Testing: Associations with EAP, Disciplinary, and Medical Claims Information* (July 1992); John Sheridan & Howard Winkler, *An Evaluation of Drug Testing in the Workplace*, Drugs in the Workplace: Research and Evaluation Data, National Institute on Drug Abuse, at 195-216 (1989).

B. Employers with Effective Substance-Abuse Prevention Programs Terminate Employees Who Twice Test "Positive" for Illicit Drug Use.

For a drug-testing program to be effective, there have to be appropriate sanctions which employees *know* will result if they violate the policy. A survey of the Institute's members found that 70 percent of the companies *always* terminate employees for a second "positive" test.[21] In addition, a survey of the Institute's members in the oil and chemical industries found that 82 percent terminate employees for a second "positive" test, and 94 percent sometimes terminate employees for a first "positive" test.[22]

If safety-sensitive employees must be reinstated after a second "positive" drug test, their employers' drug-free workplace policies are rendered impotent. They essentially have no deterrent effect, and the detection impact is greatly reduced as a segue to rehabilitation opportunities.

Thus, the perpetuation of such a precedent would destroy the value of workplace drug-testing programs. If drug-abusing employees know they can be caught without there being adverse consequences, they will not fear being caught. Thus, the incentives to stop engaging in illicit drug abuse – or not to start – would be eviscerated.

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[21] Institute for a Drug-Free Workplace. *"Member Survey: Corporate Drug and Alcohol Policies and Programs."* Washington, D.C. (1994).

[22] Institute for a Drug-Free Workplace. *"Oil and Chemical Industries Survey of Corporate Substance-Abuse Prevention Programs and Policies."* Washington, D.C. (1996).

C. Alcoholism and Drug Addiction Are Chronic Conditions for Which the Risk of Relapse Never Disappears.

Drug addiction and alcoholism are chronic diseases, and the possibility of relapse at any given time is both real and unpredictable. Medical evidence shows that for addicted individuals who seek rehabilitative services, the recidivism rate is disturbingly high. One study of alcohol recidivism, for example, reported that approximately 90 percent of alcoholics are likely to experience at least one relapse over the four-year period following treatment.[23]

A good-faith attempt by highly motivated individuals to cease the use of abusive substances does not guarantee a cure: in a 15-year study of alcoholics who were able to abstain for two years, 41 percent later relapsed, many after more than a decade of abstinence.[24]

Success in overcoming drug dependency is even more elusive. A nationally representative longitudinal study of drug users showed that five years after completing rehabilitation, the treated individuals reported a 21 percent decline in the use of any illicit drug – meaning that 79 percent continued to use drugs at least at the same rate as they did before treatment.[25] Another recent study reported

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[23] J. M. Polich et al., Stability and Change in Drinking Patterns, The Course of Alcoholism: Four Years After Treatment, 159-200 (1981).

[24] George Vaillant, M.D., *A Long-Term Follow-Up of Male Alcohol Abuse*, Archives of General Psychology, Volume 53 (Mar. 1996).

[25] The study analyzed the success rates of in-patient, out-patient, and a variety of other types of rehabilitation programs. Office of Applied Studies, Substance Abuse and Mental Health Services Administration, *Services Research Outreach Survey* (1998). The

that approximately 55 percent of people with chemical dependency are prone to relapse at some time.[26]

While these figures demonstrate that some substance abusers may benefit from treatment, they in no way support a conclusion that a former drug user who is able to return to work is cured. In short, *no one* can guarantee that an alcoholic, or a drug addict or chronic drug abuser, can abstain, will abstain, or will – or will not – relapse. Nor can one say when and under what circumstances relapse will occur.

What treatment professionals *can* predict is that relapse: (1) is *more* likely to occur during times of heightened tension or pressure (including on-the-job stress),[27] (2) is *often* linked to interpersonal conflicts (which may arise away from work and of which the employer is unlikely to have knowledge),[28] and (3) is *more* likely to occur when the historically substance-abusing individual is in isolation or relative isolation (such as in a job without on-going direct supervision).[29]

Significantly, in a world where the majority of individuals with substance-abuse problems have few or no treatment options – or, at most, are offered three months of rehabilitative services – 85 percent of those who *began* the highly regarded and well-funded addiction-treatment

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study is accessible through SAMHSA's web site at http://www.samhsa.gov.

[26] M. Dusoe, *The Use of Self-Efficacy Training in the Treatment of Relapse-Prone Individuals*, EAPA Exchange, at 6 (Feb. 1995).

[27] R.L. Rogers & C.S. McMillan, Relapse Traps: How to Avoid the 12 Most Common Pitfalls In Recovery (Bantam Books 1991).

[28] A. Beck *et al.*, Cognitive Therapy of Substance Abuse (1993).

[29] *See* n.27.

program at Phoenix House were unable to complete the two-year treatment.[30]

While no doctor, employee assistance professional, or counselor can *ever* determine that *any* individual is fully recovered and/or rehabilitated – nor can anyone predict or prevent a relapse with any certainty – all reach one universal conclusion: the rate of relapse *always* will be higher than the rate of first-time drug addiction or alcoholism. The bottom line is irrefutable: those with a history of substance abuse pose a *much* greater risk of relapse and its attendant risks than those without such a history.[31]

The undeniable truth is that an historically addicted individual may relapse into self-destructive addictive behavior without obvious signs or warning, at any time, even after years of sobriety or abstinence. If that individual's job includes safety-sensitive responsibilities, as Mr. Smith's did, the consequences of a relapse could be disastrous.

D. Reinstatement of a Safety-Sensitive Employee Who Failed a Drug Test Sends the Wrong Message to Courts, Arbitrators, Employers, and Employees Regarding a Compelling Public Policy.

Reinstatement of Mr. Smith would subvert public policy, and send a jarring signal to employers that work diligently – and successfully – to achieve the goal of a drug-free workplace, particularly in safety-sensitive environments. Rather than reinforcing the clear and dominant policy endorsed by all levels and branches of government, the Fourth Circuit's holding – unless reversed – would frustrate

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[30] "*Traditional Drug Programs Face Up to Chronic Recidivism*," Washington Post (Aug. 20, 1990).

[31] *See* n.24.

employers' efforts to protect all at-risk parties and interests from potentially catastrophic harm. It would condone employee misconduct – illegal drug use – and undermine a legitimate and widely accepted tool for achieving the critical social goal of drug-abuse prevention.

The ruling of the Fourth Circuit in this proceeding inappropriately subordinates the compelling interest of keeping drug abusers out of safety-sensitive positions. It would improperly insulate employee action at odds with the goal (substance-abuse prevention) and methodology (testing and disciplinary action) widely embraced by both the public and private sectors, and would otherwise tend to perpetuate the harm which public policy seeks to avoid.[32]

Employer practices throughout the country have proven that comprehensive drug-testing and drug-abuse prevention programs with known, uniform consequences are the most effective means of preventing the harm that employee drug abuse can cause. The effectiveness of drug testing, however, is *severely* compromised when employees terminated for illegal drug use are reinstated. The current unpredictability – and sometimes irrationality – of arbitration decisions in this regard fundamentally undermines the effectiveness of workplace drug testing.

Clear tenets of public policy argue against allowing impaired employees and employees who test "positive" for illicit drug use to perform safety-sensitive jobs. The Institute urges the Court *not* to frustrate employers and employees in their efforts to achieve drug-free workplaces. The Court should preserve employers' rights to have meaningful and

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[32] *See, e.g., Newsday, Inc. v. Long Island Typographical Union*, 915 F.2d 840 (2d Cir. 1990) (arbitrator's reinstatement of employee terminated for sexual harassment vacated due to conflict with and adverse effect upon public policy interests).

effective drug-testing programs, and to terminate safety-sensitive employees for "positive" drug tests.

In summary, if the Fourth Circuit's decision is not reversed, drug testing will be much less effective at deterring drug abuse. There will be *more* drug abuse by employees, a *substantial* compromise of workplace safety, and an undermining of *most* employers' current substance-abuse prevention programs. A policy which results in *more* drug abuse cannot be a good thing. Protecting the rights of the "James Smiths" of our society to continue to engage in dangerous and illegal behavior, while neglecting the rights of others *not* to be endangered by the continued employment of a known, repeated drug abuser in a safety-sensitive position is the height of illogic. It is wrong. The Fourth Circuit was wrong. The U.S. Supreme Court should right this wrong.

III. REVERSAL OF THE FOURTH CIRCUIT'S DECISION IS NECESSARY TO PREVENT FUTURE DRUG- AND ALCOHOL-RELATED WORKPLACE TRAGEDIES.

The devastating effects of alcohol- and drug-impaired employees are, unfortunately, widespread – and sometimes are well-publicized.

For example, on February 13, 2000, a light rail train at Baltimore-Washington International Airport crashed into a steel barrier, injuring 22 passengers. The train operator admitted to being under the influence of prescription drugs at the time of the crash and subsequently was fired from his job. The results of drug tests revealed that he also had recently used cocaine. The train operator had been involved

in at least one prior accident while operating a light rail train.[33]

Another recent example occurred on May 9, 1999, when a tour bus carrying nursing home residents veered across three lanes of traffic and crashed into a concrete and dirt embankment. Twenty-two of the passengers were killed. At the hospital after the accident, the driver tested "positive" for marijuana. Later investigation revealed he previously had been discharged from two bus driver jobs after he tested "positive" and failed successfully to complete rehabilitation. He also had tested "positive" for cocaine on a preemployment drug screen administered by Greyhound.[34]

Another highly publicized fatal accident involving a drug-impaired employee occurred on April 15, 1998, when a truck driver drove a gasoline tanker filled with 9,100 gallons of fuel off the road and through the fence of an asphalt refinery in Portland, Oregon. The driver died in the crash, and toxicology tests showed that he had alcohol, cocaine, marijuana, and methamphetamines in his system.[35]

In fact, the impetus for Congressional action on required drug and alcohol testing for employees in safety-sensitive, transportation-related jobs came from two fatal disasters caused by drug-impaired employees.

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[33] Lyndsey Layton and Don Phillips, *Drug Use Cited in Crash of BWI Train*, Wash. Post, Feb. 24, 2000, at B1; Matthew Mosk, *Driver in BWI Train Crash Had Prior Rail Accidents*, Wash. Post, Feb. 25, 2000, at B1.

[34] Kristen Delguzzi, *Driver Fired Twice For Drug Use*, New Orleans Times Picayune, May 14, 1999, at A1.

[35] Maxine Bernstein, *Trucker in Wreck Had Drugs in System*, The Oregonian, Apr. 30, 1998, at 5.

First, on January 4, 1987, a high-speed Amtrak passenger train collided with three Conrail locomotives at a junction in Chase, Maryland. Sixteen people were killed, 170 people were seriously injured, and $19 million in damages were caused. The engineer and brakeman of the Conrail locomotives both tested "positive" for marijuana after the accident.[36]

Subsequently, on August 28, 1991, a subway train in New York City derailed, killing 5 people and injuring more than 200 people. The subway motorman was legally drunk and ran the subway across a switch at high speed. In addition, an empty vial with traces of crack was found in the cab of the train. The motorman, who was not injured in the accident, was charged with manslaughter.[37]

If this Court affirms the Fourth Circuit's decision that reinstatement of a safety-sensitive employee who has tested "positive" for illicit drug use does not violate public policy, James Smith may well be the perpetrator of the next catastrophic drug-related workplace accident.

CONCLUSION

The Institute for a Drug-Free Workplace respectfully urges the Supreme Court to reverse the rulings that would require the reinstatement of James Smith despite his recurring illegal conduct and violations of company policy – specifically, his repeated "positive" drug tests – and to recognize that his mandated reinstatement would be a clear and indefensible violation of public policy.

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[36] Reginald Stuart, *Drug Trace Found in 2 Rail Workers After Fatal Crash*, N.Y. Times, Jan. 15, 1987, at A1.

[37] Alan Finder, *IRT Driver Charged in 5 Deaths; Crash Shuts Line and Ties Up City*, N.Y. Times, Aug. 29, 1991, at A1.

Respectfully submitted,

PETER A. SUSSER
Counsel of Record
MARK A. DE BERNARDO
KATHERINE A. GOETZL
LITTLER MENDELSON, P.C.
1225 I Street, N.W., Suite 1000
Washington, D.C. 20005
(202) 842-3400

Counsel for Amicus Curiae,
The Institute for a
Drug-Free Workplace

May 4, 2000

No. 99-1038

JUL 3 1 2000

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Supreme Court of the United States

EASTERN ASSOCIATED COAL CORPORATION,
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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ACADEMY OF ARBITRATORS IN SUPPPORT OF RESPONDENTS

THEODORE J. ST. ANTOINE *
Special Counsel
Hutchins Hall
625 South State Street
Ann Arbor MI 48109-1215
(734) 764-9348

JOHN KAGEL
President, National Academy of Arbitrators
P.O. Box 50787
Palo Alto CA 94303
(650) 325-0389
Counsel for Amicus Curiae, National Academy of Arbitrators

Of Counsel:

DAVID E. FELLER
Boalt Hall
Bancroft at Piedmont
Berkeley CA 94720
(415) 642-0629

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. The Arbitrator Is the Parties' Definitive Interpreter or "Reader" of Their Collective Bargaining Agreement, Their Agent or Surrogate for Fashioning a Remedy, and Anything the Parties Could Do on Their Own, the Arbitrator Can Direct Them to Do 5

II. An Arbitrator's Decision Finding a Lack of "Just Cause" for Discipline and Ordering Reinstatement or Other Relief Should Be Upheld Against a Court Challenge on Public Policy Grounds Unless the Remedy Would Require a Violation of Positive Law 7

III. No "Explicit Public Policy" That Is "Well Defined and Dominant" Precludes the Reinstatement of an Employee Who Has Taken Illegal Drugs in the Past, and Here Statutorily Based Policies of Industrial Peace and the Duty to Bargain Are Supportive 14

CONCLUSION 23

TABLE OF AUTHORITIES

CASES: Page

American Postal Workers v. United States Postal Serv., 682 F.2d 1280 (9th Cir. 1982) 10
Boys Markets v. Retail Clerks Local 770, 398 U.S. 235 (1970) 12
Chrysler Motors Corp. v. Allied Indus. Workers, 959 F.2d 685 (7th Cir. 1992), *cert. denied*, 506 U.S. 908 (1992) 8
Cole v. Burns International Security Servs., 105 F.3d 1465 (D.C. Cir. 1997) 6
Delta Airlines v. ALPA, 861 F.2d 665 (11th Cir. 1988), *cert. denied*, 493 U.S. 871 (1989) 9
E.I. DuPont de Nemours & Co. v. Grasselli Employees Independent Ass'n of East Chicago, 790 F. 2d 611 (7th Cir. 1986), *cert. denied*, 479 U.S. 853 (1986) 9, 16
Exxon Corp. v. Exxon Workers, 118 F.3d 841 (1st Cir. 1997) 8
Exxon Shipping Co. v. Exxon Seamen's Union, 993 F.2d 357 (3d Cir. 1993) 9
Exxon Corp. v. Baton Rouge Oil & Chemical Workers, 77 F.3d 850 (5th Cir. 1996) 9
Gateway Coal Co. v. Mine Workers, 414 U.S. 368 (1974) 10, 21
Homestake Mining Co. of California v. Steelworkers Local 7044, 153 F.3d 678 (8th Cir. 1998) 8
IBEW Local 97 v. Niagara Mohawk Power Corp., 196 F.3d 117 (2d Cir. 1999) 8
Iowa Elec. Light & Power Co. v. IBEW Local 204, 834 F.2d 1424 (8th Cir. 1987) 9
Kennecott Utah Copper Corp. v. Becker, 195 F.3d 1201 (10th Cir. 1999) 8
Meat Cutters Local P-1236 v. Jones Dairy Farm, 680 F.2d 1142 (7th Cir. 1982) 11

TABLE OF AUTHORITIES—Continued

Page

Muschany v. United States, 324 U.S. 49 (1945).... 14
NLRB v. American Nat'l Can Co., 924 F.2d 518 (4th Cir. 1991), *enforcing* 293 N.L.R.B. 901 (1989)..... 21
Northwest Airlines v. ALPA, 808 F.2d 76 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1014 (1988)..... 8
Paperworkers v. Misco, Inc., 484 U.S. 29 (1987)..... *passim*
Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960)..... 10
Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).....10, 11, 12
Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960).....5, 6, 10
Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962)..... 12, 21
TVA v. Tennessee Valley Trades & Labor Council, 184 F.3d 510 (6th Cir. 1999)..... 8
UFCW Local 588 v. Foster Poultry Farms, 74 F. 3d 169 (9th Cir. 1995)..... 8
Westvaco Corp. v. Paperworkers, 171 F.3d 971 (4th Cir. 1999)..... 8
W. R. Grace & Co. v. Rubber Workers Local 759, 461 U.S. 757 (1983)..... 8, 14

ADMINISTRATIVE DECISIONS:

Goya Foods, 238 N.L.R.B. 1465 (1978)..... 12
Hi-Tech Cable Corp., 318 N.L.R.B. 280 (1995), *enforced in part*, 128 F.3d 271 (5th Cir. 1997)..... 21

TABLE OF AUTHORITIES—Continued

ARBITRATION DECISIONS: Page

Avnet, Inc., 107 LA 921 (D. Kadue 1996) 19
Biolab, Inc., 114 LA 279 (D. Brodsky 2000)..... 19
Columbia Gas of Pennsylvania, 102 LA 513 (J. Duff 1994)..... 19
Exxon Pipeline Co., 109 LA 951 (J. Abercrombie 1997) 19
Nature's Best, 114 LA 217 (J. Grabuskie 1999).... 19
North Star Steel, Texas, 114 LA 234 (K. Eisenmenger 1999) 19
Rothe Development, Inc., 106 LA 97, 99 (B. Baroni 1996) 19
Westinghouse Hanford Co., 101 LA 46 (L. Nelson 1993)..... 19

STATUTES:

5 U.S.C. § 7311..... 10
Labor Management Relations Act § 301, 29 U.S.C. § 185..... 2
Meat Inspection Act, 21 U.S.C. § 601 11
National Labor Relations Act § 8(a)(5), (b)(3), (d), 29 U.S.C. § 158(a)(5), (b)(3), (d) 21

OTHER AUTHORITIES:

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Page

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BNA, Labor Relations Cumulative Digest and Index 1971- 1975 (1976) 13

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Easterbrook, Frank H., *Arbitration, Contract, and Public Policy*, in Arbitration 1991: The Changing Face of Arbitration in Theory and Practice, Proceedings of the 44th Annual Meeting, National Academy of Arbitrators 65 (G. Gruenberg ed. 1992) 16, 22

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TABLE OF AUTHORITIES—Continued

Page

Elkouri, Frank & Edna Asper Elkouri, How Arbitration Works (M. Volz & E. Goggin eds. 5th ed. 1997) 12

Feller, David E., *Court Review of Arbitration*, 43 Lab. L. J. 539 (1992) 16

Jones, Jr., Edgar A., *The Role of Arbitration in State and National Labor Policy*, in Arbitration and the Public Interest, Proceedings of the 24th Annual Meeting, National Academy of Arbitrators 42 (G. Somers & B. Dennis eds. 1971) 19

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Meltzer, Bernard D., *After the Labor Arbitration Award: The Public Policy Defense*, 10 Indus. Rel. L.J. 241 (1988) 16

St. Antoine, Theodore J., *Judicial Review of Labor Arbitration Awards: A Second Look at* Enterprise Wheel *and its Progeny*, in Arbitration – 1977, Proceedings of the 30th Annual Meeting, National Academy of Arbitrators 29 (B. Dennis & G. Somers eds. 1978), *reprinted as revised in* 75 Mich. L. Rev. 1137 (1977) 5

IN THE

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ACADEMY OF ARBITRATORS IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE* [1]

The National Academy of Arbitrators, founded in 1947, is a professional organization of neutrals. Advocates for

[1] The parties have kindly consented to the submission of this brief. Letters of consent have been filed with the Clerk of the Court. In accordance with Rule 37.6, we declare that counsel for a party did not author this brief in whole or in part, and no person or entity, other than the *amicus curiae*, has made a monetary contribution to the preparation or submission of the brief.

employers or labor unions are not eligible for admission. As of May 2000 the Academy had 624 members in the United States and Canada. To be considered for membership, an arbitrator must demonstrate acceptability by labor and management through substantial and current experience in arbitrating labor-management disputes (a bare minimum of 50 cases within 5 years with a variety of parties) or, as an exception, must enjoy general recognition as an important authority in labor-management relations through scholarly publication or other activities in addition to demonstrating current but more limited experience in arbitration.

The principal purposes of the Academy, as set out in its Constitution, are "to establish and foster the highest standards of integrity, competence, honor, and character among those engaged in the arbitration of labor-management disputes on a professional basis; to secure the acceptance of and adherence to the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes ... ; to promote the study and understanding of the arbitration of labor-management and employment disputes . . . . "

The Academy is the co-author and major adjudicator of an ethical code, the previously mentioned Code of Professional Responsibility, which has also been adopted by the American Arbitration Association and the Federal Mediation and Conciliation Service. In addition, the proceedings of the annual meetings of the Academy, published by the Bureau of National Affairs, constitute the most authoritative existing collection of studies on the labor arbitration process.

The Academy believes that the involvement of the law in the arbitration process, as Congress in effect mandated by enacting Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, should serve to effectuate the purposes for which employers and unions have developed voluntary arbitration. The tenor of this Court's decisions concerning arbitration has generally fulfilled that purpose.

The present case has the potential for disturbing the salutary regime established by the Court's prior decisions. For that reason the Academy thought it appropriate to file this brief.

This case is typical of many in which an arbitrator has exercised the authority under a collective bargaining agreement to reinstate a wrongdoing employee. The extensive experience of our membership with many similar cases should place this particular instance in better perspective. Our hope is that our brief will assist the Court to understand the context in which cases like the present one arise, and to formulate doctrine supportive rather than disruptive of a process that employers and unions alike have found highly desirable for the final resolution of labor-management disputes.

SUMMARY OF ARGUMENT

A simple, basic principle should control this case. In declaring that an arbitral decision shall be "final" or "binding," a collective bargaining agreement makes the arbitrator the parties' definitive interpreter or "reader" of their contract. What he or she says the agreement means is, by definition, what the parties meant it to say. Similarly, since arbitration is the substitute for labor strife, what the award directs the parties to do is what they have contractually decided to do to resolve their dispute rather than engage in industrial warfare. In all of this the arbitrator is the parties' "agent" or "alter ego." Anything the parties could lawfully have done to settle their controversy themselves, the arbitrator is empowered to order.

The legal consequences are twofold. First, when an arbitrator has considered the "just cause" of an employee's discharge and has concluded dismissal was too severe, ordering reinstatement with or without back pay, the award should be upheld against a court challenge on public policy grounds unless the remedy prescribed by the arbitrator would

require a violation of positive law. That would answer the question left open in *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 45 n. 12 (1987). It would still leave open, however, the question of whether a contractual rule or provision could itself be set aside on the theory it violates public policy, as distinct from a statute, regulation, or common law. That might pose an issue of contract enforcement as such, where generalized public policy has traditionally played a role. In the discipline case, on the other hand, the parties, and the employer in particular, have delegated to the arbitrator the authority to fashion a remedy, taking both equitable and policy considerations into account. The arbitrator should be able to order anything the employer could have done on its own, unilaterally, or in conjunction with the union. Thus, only a specific prohibition of positive law, and not the vaguer notions of public policy, ought to prevent enforcement of an arbitral award reinstating a fired employee.

Second, even if more generalized concepts of public policy are to be considered in a challenge to an arbitration decision on discipline, there is still no basis for setting aside the award in this or similar cases. We repeat our basic principle that public policy should not prevent the enforcement of a reinstatement award unless public policy would have prevented the employer from reinstating the employee on its own or as part of a settlement with the union at an earlier stage of the grievance procedure. Both the arbitrator and the courts below gave full and careful attention to the policy issues. And the Court of Appeals got it exactly right: "[A]lthough there is a public policy against the use of illegal drugs by those in safety-sensitive positions, there is no such policy against the reinstatement of employees who have used iliegal drugs in the past" (Petition for Certiorari, App. A, pp. 3a-4a). The critical inquiry is not the triggering conduct of the wrongdoing employee, but rather the action ordered by the decisionmaking arbitrator. Any other approach would require,

in our view, the overruling of *Misco*. It would also constitute a frontal assault on the finality of arbitral awards, one of the central pillars of industrial peace, and on the statutory duty to bargain.

ARGUMENT

I. THE ABITRATOR IS THE PARTIES' DEFINITIVE INTERPRETER OR "READER" OF THEIR COLLECTIVE BARGAINING AGREEMENT, THEIR AGENT OR SURROGATE FOR FASHIONING A REMEDY, AND ANYTHING THE PARTIES COULD DO ON THEIR OWN, THE ARBITRATOR CAN DIRECT THEM TO DO.

By now it is a cliché that in labor disputes, "arbitration is the substitute for industrial strife," and "part and parcel of the collective bargaining process itself." *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). A problem with clichés is that their familiar surface truths can blind us to their deeper implications. One emerging lesson is that, as was said at an annual meeting of the National Academy of Arbitrators, "the arbitrator is the parties' officially designated 'reader' of the contract. He or she is their joint alter ego for the striking of whatever supplementary bargain is necessary.... [A] reviewing court should ordinarily treat his or her award exactly as if it were a written stipulation by the parties setting forth their own definitive construction of the labor contract."[2] That is the purport of the "final" and "binding" language almost invariably found in the arbitration

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[2] Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at* Enterprise Wheel *and its Progeny*, in Arbitration – 1977, Proceedings of the 30th Annual Meeting, National Academy of Arbitrators 29, 30 (B. Dennis & G. Somers eds. 1978), *reprinted as revised in* 75 Mich. L. Rev. 1137, 1140 (1977).

clauses of collective bargaining agreements. The concept of the arbitrator as the parties' "contract reader" and "alter ego" received explicit judicial endorsement in *Cole v. Burns International Security Services*, 105 F.3d 1465, 1474-75 (D.C. Cir. 1997).

This view of the arbitrator's authority is entirely in keeping with the teachings of this Court. The aim, as set forth in *Warrior & Gulf*, *supra*, 363 U.S at 578, is to substitute "arbitration," as "part and parcel of the collective bargaining process," for "industrial strife." The arbitrator is the "*agent* appointed by the parties" to determine the "historical facts" and formulate a "fair solution." *Misco*, *supra*, 484 U.S. at 39, 41 (emphasis supplied). Before reaching the arbitration stage, the ultimate means of avoiding a work stoppage, employers and unions customarily seek an amicable resolution of their dispute through the various steps of the contractual grievance procedure. If they fail, they call upon their "agent" or surrogate to find the solution they could not devise or agree upon. The arbitrator stands in the parties' shoes. The arbitration is simply an extension of the parties' own bargaining. It follows naturally that anything the employer could lawfully have done to settle a labor dispute, unilaterally or in conjunction with the union, should be available to the arbitrator as a potential remedy.[3] What the employer and the union could have done on their own, the arbitrator can direct them (or either one of them) to do.

The implications of this analysis apply directly to the present case. Especially important is the distinction between

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[3] For the similar views of Judge Frank Easterbrook and Professors Charles Craver and David Feller, see *infra* notes 10-12 and accompanying text. We speak here only of claims that the award itself violates some legal standard. We assume for these purposes that the arbitrator has not exceeded his or her authority under the parties' commission (nor been guilty of fraud or corruption).

the roles of a court in handling contracts generally and of an arbitrator in dealing with a labor agreement. The court is an arm of the state and, once its jurisdiction is invoked, it acts independently of the consent of the parties. A trial court's interpretation of a contract is subject to correction by appellate courts. An arbitrator, on the other hand, is the parties' sole chosen spokesperson, and their alter ego or agent for fashioning such remedy as the circumstances warrant. By agreement, the employer and the union have delegated their decisionmaking powers to the arbitrator. Any solution they could have voluntarily adopted without violating some applicable legal standard should be available for the arbitrator to impose upon them. If the futility of court challenges like this one is solidly reconfirmed, the result will be an expeditious, final determination of the conditions of the parties' continuing relationship by a mutually accepted expert. The gain for all is industrial peace in place of industrial warfare.

II. AN ARBITRATOR'S DECISION FINDING A LACK OF "JUST CAUSE" FOR DISCIPLINE AND ORDERING REINSTATMENT OR OTHER RELIEF SHOULD BE UPHELD AGAINST A COURT CHALLENGE ON PUBLIC POLICY GROUNDS UNLESS THE REMEDY WOULD REQUIRE A VIOLATION OF POSITIVE LAW.

In *Misco*, *supra*, 484 U.S. at 45 n. 12, this Court expressly declined to address the question whether "a court may refuse to enforce an award on public grounds only when the award itself violates a statute, regulation, or other manifestation of positive law, or compels conduct by the employer that would violate such a law." Without necessarily agreeing with the Petitioner's classification of all the cases in the lower courts, we are in accord that the result has been considerable confusion among the courts of appeals. See Petition for Certiorari, No. 99-1038, pp. 22-30, and cases cited. It is time

to end the confusion with a clear answer. An arbitral decision dealing with the "just cause" of an employee's discipline, which finds the employer's reason insufficient to justify the sanction imposed and orders reinstatement or other relief, should be sustained against a court challenge on public policy grounds, unless the remedy prescribed would require a violation of positive law. Positive law here means a statute, valid regulation, or common law precedent.

This sharper demarcation line between law and some nebulous public policy appears more responsive to the requirement in *W.R. Grace & Co. v. Rubber Workers Local 759*, 461 U.S. 757, 766 (1983), that before an arbitrator's contract interpretation can be set aside, it must violate "some explicit public policy" that is "well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" In *Misco*, *supra*, 484 U.S. at 43, this Court expressly stated that "our decision [in *W.R. Grace*] turned on our examination of whether the award created any explicit conflict with 'other laws and legal precedents' rather than an assessment of 'general considerations of supposed public interests.'" Although the opinions of various courts of appeals are not always crystal clear in their rationale, our position seems supported by recent decisions from the Second, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits.[4]

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[4] *See IBEW Local 97 v. Niagara Mohawk Power Corp.*, 196 F.3d 117 (2d Cir. 1999); *Westvaco Corp. v. Paperworkers*, 171 F.3d 971 (4th Cir. 1999); *TVA v. Tennessee Valley Trades & Labor Council*, 184 F.3d 510 (6th Cir. 1999); *Chrysler Motors Corp. v. Allied Indus. Workers*, 959 F.2d 685 (7th Cir. 1992), *cert. denied*, 506 U.S. 908 (1992); *Homestake Mining Co. of California v. Steelworkers Local 7044*, 153 F.3d 678 (8th Cir. 1998); *UFCW Local 588 v. Foster Poultry Farms*, 74 F. 3d 169 (9th Cir. 1995); *Kennecott Utah Copper Corp. v. Becker*, 195 F.3d 1201 (10th Cir. 1999); *Northwest Airlines v. ALPA*, 808 F.2d 76 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1014 (1988). *But see Exxon Corp. v. Exxon Workers*,

In accordance with the concept of the arbitrator as the parties' "contract reader" and "agent or alter ego," when an arbitrator decides a discharge was not for just cause and reinstates the employee with or without back pay, it is just as if the employer and the union had stipulated in so many words that this was the prescribed remedy under the circumstances. A court asked to set aside such an award should do so only if it concludes that an amicable settlement of the dispute by the parties themselves, incorporating the same provisions as the arbitral award, would be unenforceable. If the parties' own voluntary action would not be prohibited under federal or state statute or valid regulation, however, then the like decision of their agent or alter ego should similarly be sustained.

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118 F.3d 841 (1st Cir. 1997); *Exxon Shipping Co. v. Exxon Seamen's Union*, 993 F.2d 357 (3d Cir. 1993); *Exxon Corp. v. Baton Rouge Oil & Chemical Workers*, 77 F.3d 850 (5th Cir. 1996); *Delta Airlines v. ALPA*, 861 F.2d 665 (11th Cir. 1988), *cert. denied*, 493 U.S. 871 (1989). Several circuits have decisions that can be read as going in different directions on the issue. *Cf. E.I. DuPont de Nemours & Co. v. Grasselli Employees Independent Ass'n of East Chicago*, 790 F.2d 611 (7th Cir. 1986), *cert. denied*, 479 U.S. 853 (1986); *Iowa Elec. Light & Power Co. v. IBEW Local 204*, 834 F.2d 1424 (8th Cir. 1987).

Another distinction can be discerned in these cases. Those courts that more readily overturn arbitration awards on public policy grounds tend to ask whether the past conduct of the grievant violated law or public policy. Other courts, more properly, ask whether what the arbitrator directs the employer to do will violate law or public policy. Under the former approach, the reinstatement of a wrongdoing employee will often be set aside because it is viewed as tantamount to condoning the employee's past violation of law. Under the latter approach, the court appreciates that the arbitrator, who very commonly imposes a lengthy disciplinary suspension without pay, is not at all condoning the grievant's past wrongdoing. Rather, the arbitrator is focusing on whether that misconduct forever disables the grievant to work productively for the employer, taking into account longevity of service, prior discipline, work record, safety considerations, and the like.

Conversely, if a particular employee is legally barred from a job, a reinstatement award cannot be enforced. For example, in *American Postal Workers v. United States Postal Service*, 682 F.2d 1280 (9th Cir. 1982), an award was set aside because the reemployment of a person who had struck against the government was forbidden by 5 U.S.C. § 7311. But except in like circumstances, an arbitrator's decision that there was no just cause for a dismissal should be upheld against attack on public policy grounds.

This Court has already held that there is no magic in invoking "safety" as the basis for resisting an arbitral award. In *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368 (1974), miners had struck to protest conditions they claimed were unsafe. A district court enjoined the strike as a breach of contract and an arbitrator ruled against the strikers' safety complaints. The Court of Appeals vacated the injunction, declaring that "no enlightened society" requires workers "to submit matters of life and death to arbitration." Quoted in 414 U.S. at 376. This Court reversed on the authority of the *Steelworkers Trilogy*.[5] In response to the concern of the lower court's majority that an arbitrator might not appreciate "the workers' interest in their own safety," it was said: "We see little justification for the court's assumption, especially since the parties are always free to choose an arbitrator whose knowledge and judgment they trust." *Id.* at 379.

An employer should be no more entitled than a union to rely on the public's generalized interest in safety as the grounds for refusing to comply with an arbitrator's otherwise legitimate award. That is especially so since the party resisting enforcement in these situations is hardly a disinterested enforcer of the public good. Invariably it is

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[5] *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

seeking to promote private ends and avoid its contractual commitments to accept a final and binding arbitral decision. Furthermore, there is no reason to think that a union would be any less concerned than an employer about the genuine safety interests of fellow employees and the general public. In light of the way this Court struck the balance in *Gateway Coal* between safety concerns and arbitral finality, we see no basis for setting aside an award, at least not a reinstatement award, because of some supposed "safety" interest, unless the decision does indeed violate positive law.

There is one possible qualification or exception to the principle we advocate. It is conceivable that a distinction should be drawn between situations where the issue is whether the arbitrator's decision on the "just cause" of an employer's discipline should be sustained, and where the issue is whether a contract rule itself is contrary to public policy. The latter was the question in *Meat Cutters Local P-1236 v. Jones Dairy Farm*, 680 F.2d 1142 (7th Cir. 1982). The employer promulgated a rule forbidding meat- packing employees to report problems directly to the U.S. Department of Agriculture. An arbitrator rejected the union's challenge to the rule. The Court of Appeals upheld the trial court in overturning the award and permanently enjoining enforcement of the rule, on the grounds it violated the public policy expressed in the Meat Inspection Act, 21 U.S.C. § 601. Significantly, however, no question of employee discipline was before the court. The issue was the validity of the rule itself. That is not the issue here. This possible qualification also answers the Petitioner's contention that "ancient" common law doctrine supports its position that a court will not enforce a contract contrary to public policy. Petitioner's Brief, p. 12 n. 3.

In the seminal case on judicial review of arbitral awards, *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), a potential public policy defense existed. Employees

had struck in breach of contract over an arbitrable grievance and were discharged. The arbitrator found their conduct improper but reduced the discipline to a 10-day suspension and reinstated them. The public policy against the employees' work stoppage is strong and well defined, and based on statute. *Cf. Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 105 (1962) ("basic policy of national labor legislation [is] to promote the arbitral process as a substitute for economic warfare"); *Boys Markets v. Retail Clerks Local 770*, 398 U.S. 235 (1970); *see also Goya Foods*, 238 N.L.R.B 1465 (1978). Yet there was no suggestion that the reinstatement award in *Enterprise Wheel* was unenforceable for that reason.

We reiterate that the focus in this case should also be on the legality of the action ordered by the arbitrator, not on the recognized violation by the grievant. The essential vice of a nonspecific "public policy" criterion as applied to the arbitrator's directive is that it is too vague, too expansive, and too tempting for manipulation and abuse. Judges unfamiliar with the practices and mores of the industrial workplace, but endowed with strong idiosyncratic beliefs about what is right and proper, could be persuaded to substitute their own set of values for the premises and reasoning of the parties' mutually selected arbiter. That would be contrary to all the basic lessons of this Court about judicial deference to the arbitration process, and the importance of arbitral finality, from *Enterprise Wheel* right through *Misco*.

Over the years only a tiny fraction of all arbitrations – varying from less than 1.0 to 1.5 percent – have become the subject of any sort of court proceedings.[6] Yet one scholarly

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[6] Frank Elkouri & Edna Asper Elkouri, How Arbitration Works 29 n. 5 (M. Volz & E. Goggin eds. 5th ed. 1997); Michael H. LeRoy & Peter Feuille, *The* Steelworkers Trilogy *and Grievance Arbitration Appeals: How the Federal Courts Respond*, 13 Indus. Rel. L.J. 78, 118 (1991). Overall, there has been a substantial increase in the number of arbitration

study indicated that in the six-year period preceding *Misco*, the courts of appeals vacated 66.7 percent of the awards that reached them with challenges on public policy grounds.[7] Even during the four years following *Misco*, circuit courts overturned arbitral decisions in 33.3 percent of the public policy appeals.[8] Certain lower courts have apparently still not got the word.

The inevitable result is that parties with a sincere belief that an award is wrong, or parties with a simple desire to delay compliance, will not be put off from a suit by odds on the order of only 2-to-1 against them. There is an urgent need for this Court to deliver a clear, firm message that arbitration awards, at least in disciplinary cases, can be effectively challenged only on the grounds they violate positive law, and not on the basis they are contrary to some vague, equivocal public policy. Otherwise, the whole federal structure of arbitral finality as a key to industrial peace, so carefully constructed from the *Steelworkers Trilogy* on, could be at serious risk.

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awards reviewed by the federal courts for one reason or another during the past three decades. For the five-year period of 1971-75 one commercial service listed only around 42 cases in the courts of appeals. BNA, Labor Relations Cumulative Digest and Index 1971-1975 pp. 1653-75 (1976). During the five-year periods of 1981-85 and 1991-95, the count ranged between about 95 and 135 cases. 2 BNA, Labor Relations Cumulative Digest and Index 1981-1985 pp. 2531-81 (1986); 2 BNA, Labor Relations Cumulative Digest and Index 1991-1995 pp. 2563-2604 (1996). The district courts of course entertained considerably more cases, which were often unreported.

[7] LeRoy & Feuille, *supra* note 6, at 106.

[8] *Ibid.*

III. NO "EXPLICIT PUBLIC POLICY" THAT IS "WELL DEFINED AND DOMINANT" PRECLUDES THE REINSTATEMENT OF AN EMPLOYEE WHO HAS TAKEN ILLEGAL DRUGS IN THE PAST, AND HERE STATUTORILY BASED POLICIES OF INDUSTRIAL PEACE AND THE DUTY TO BARGAIN ARE SUPPORTIVE.

Even if the grounds for vacating arbitration decisions were extended beyond positive law to encompass some broader concept of public policy, an award reinstating an employee like the grievant in the present case should not be set aside. To do so would do violence to both the holding and the rationale in *Paperworkers v. Misco, Inc.*, 484 U.S. 29 (1987).

In Misco the employee operated a dangerous paper-cutting machine and had been reprimanded for "deficient performance." *Id.* at 32. It was an "established fact that traces of marijuana had been found in [his] car." *Id.* at 44. Yet even assuming a valid public policy against operating hazardous equipment while using drugs, this Court considered there was too "tenuous" a connection to find the employee actually used drugs in the workplace. *Ibid.* The Fifth Circuit's vacation of the arbitrator's reinstatement award was reversed. In the course of its opinion the Court reaffirmed the now-familiar principle that "a court's refusal to enforce an arbitrator's interpretation of [labor] contracts is limited to situations where the contract as interpreted would violate 'some explicit public policy' that is 'well defined and dominant, and is to be ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interests." ' " *Id.* at 43 (emphasis in the original).[9]

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[9] Quoting *W.R. Grace & Co. v. Rubber Workers Local 759*, 461 U.S. 757, 766 (1983), which in turn had quoted *Muschany v. United States*, 324 U.S. 49, 66 (1945).

In the present case the arbitrator accepted the finding of an earlier arbitration that the grievant, a mobile equipment operator, was a "recreational user of illegal drugs and not an addicted user" (Petition for Certiorari, App. D, p. 27a). The arbitrator also credited the employee's testimony that he failed a random drug test, after passing several earlier ones, because of "a personal/family problem which caused this one time lapse in drug usage" (id. at 28a). The grievant had been "an otherwise solid employee for a significant period of time" (*id.* at 27a). Most significantly, there is no suggestion he ever used drugs on the job. The arbitrator ordered grievant "returned to work" in 2½ months (without further specification as to the nature of his duties), but subject to severe conditions (*id.* at 29a). He was required to participate in a substance abuse program for five years, get tested randomly during that period, and provide his employer with an undated letter of resignation for use if he failed any drug test in the next five years.

In enforcing the arbitrator's award, the District Court found pertinently that "the DOT [Department of Transportation] Regulations do not express an explicit, well defined public policy permanently enjoining the employment of commercial motor vehicle drivers who test positive for drug use" (Petition for Certiorari, App. B, p. 20a). And in its unpublished per curiam affirmance, the Court of Appeals was, in our view, right on the mark with its succinct statement: "[A]lthough there is a public policy against the use of illegal drugs by those in safety-sensitive positions, there is no such policy against the reinstatement of employees who have used illegal drugs in the past" (Petition for Certiorari, App. A, pp. 3a-4a).

Again, we return to our underlying theme that an arbitral award in a discipline case should be tested by the standard applicable to the employer acting on its own or acting jointly with the union. What it can do without violating public policy, the arbitrator can order. In various formulations, three

distinguished observers and analysts of the labor relations scene, Judge Frank Easterbrook and Professors Charles Craver and David Feller, all agree.

Says Judge Easterbrook: "If the [business] firm, honestly implementing its contract with the employees, kept the [psychotic] or thief on the payroll, no public policy would stand in the way.... If the arbitrator acts within the scope of his authority, the decision should be treated the same as the management's own." [10] Professor Craver puts it this way: "[Courts] should thus restrict application of the public policy exception to those extremely rare instances in which the action ordered by the arbitrator would be wholly improper if directed by the negotiating parties themselves." [11] In accord with Judge Easterbrook, Professor Feller declares: "[I]f under a given collective bargaining regime, higher management would have the legal right to reverse an initial decision to discharge because of [employee] conduct violating public policy, then an arbitrator's award to the same effect, if based on the contract, should be enforced." [12]

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[10] Frank H. Easterbrook, *Arbitration, Contract, and Public Policy*, in Arbitration 1991: The Changing Face of Arbitration in Theory and Practice, Proceedings of the 44th Annual Meeting, National Academy of Arbitrators 65, 70 (G. Gruenberg ed. 1992). *See E.I. DuPont de Nemours & Co. v. Grasselli Employees Independent Ass'n of East Chicago*, 790 F.2d 611, 618 (7th Cir. 1986) (Easterbrook, J., concurring).

[11] Charles B. Craver, *Labor Arbitration as a Continuation of the Collective Bargaining Process*, 66 Chi.-Kent L. Rev. 571, 604 (1990).

[12] David E. Feller, *Court Review of Arbitration*, 43 Lab. L. J. 539, 543 (1992). For earlier expressions of concern about an excessive intrusion of public policy, see Harry T. Edwards, *Judicial Review of Labor Arbitration Awards: The Clash between the Public Policy Exception and the Duty to Bargain*, 64 Chi.-Kent L. Rev. 3, 4 (1988); Bernard D. Meltzer, *After the Labor Arbitration Award: The Public Policy Defense*, 10 Indus. Rel. L.J. 241, 242 (1988) (advocating a "balancing approach").

To the best of our knowledge, no one has suggested that the employer in the present case, or any employer in a similar case, could not lawfully have reinstated the discharged employee, either out of the goodness of its heart or because the employee was an exemplary worker or as a means of avoiding economic conflict. Indeed, the employer in this case itself reserved the right not to fire employees who tested positive for drug use. Its substance abuse policy states that such a test required discipline "up to and including termination" (Petition for Certiorari, App. B, p. 17a). The employer plainly considered itself entitled to impose a lesser discipline than discharge. And, in doing so, the employer would not have to attach the divers protective conditions that the arbitrator in fact mandated here. It follows ineluctably that the arbitral award to the same effect should stand. An arbitrator and four judges have examined the applicable Department of Transportation Regulations and none has found any legal or policy impediment to the remedy prescribed, let alone to the employer's right, which the employer explicitly reserved to itself, to take such action unilaterally.

A natural concern is that such matters as safety and health are not always the private preserve of employers and unions. The general public has a legitimate, even vital interest in the physical and mental condition of persons flying planes, piloting ships, and driving motor vehicles on our highways. Once one concedes, however, that in a given case an employer is entitled to decide, without the intervention of federal or state law or regulation, whether a drug or alcohol user can continue to operate such equipment, there is no reason to suppose that a professional neutral, properly authorized and briefed, is any less capable than the usual employer to make that decision.

Every decision about the discharge of an employee who engages in conduct that may endanger the workplace involves

a balancing of the interest in safety and the interest in justice to the erring employee. Unions and employers alike are concerned about both interests. When they disagree on the proper balance between safety and justice, they call upon the arbitrator as their surrogate to decide, pursuant to the "just cause" mandate of their contract, whether the employer's decision to discharge has struck the right balance. The arbitrator's judgment does not exclude but indeed must include consideration of safety and public policy. What this Court said in *Misco*, *supra*, 484 U.S. at 45, is highly relevant here:

> Nor does the fact that it is inquiring into a possible violation of public policy excuse a court for doing the arbitrator's task.... Had the arbitrator found that [grievant] Cooper had possessed drugs on the property, yet imposed discipline short of discharge because he found as a factual matter that Cooper could be trusted not to use them on the job, the Court of Appeals could not upset the award because of its own view that public policy about plant safety was threatened.

Accordingly, even though "the question of public policy is ultimately one for resolution by the courts," *W.R. Grace*, *supra*, 461 U.S. at 766, quoted in *Misco*, *supra*, 484 U.S. at 43, arbitrators have traditionally taken public policy into account in deciding safety issues. In an early study, Professor Alfred Blumrosen concluded that arbitrators "handle public policy considerations with understanding and intelligence." [13] A "just cause" determination by its very nature creates what Professor Edgar Jones, a past Academy president, called a "necessity for an arbitrator to assess the 'common stock of

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[13] Alfred W. Blumrosen, *Public Policy Considerations in Labor Arbitration Cases*, 14 Rutgers L. Rev. 217, 263 (1960).

ideas' about what is tolerable in our society." [14] Recent cases demonstrate the continuing validity of that observation.

The latest, still-incomplete volume of BNA's Labor Arbitration Reports contains several such decisions. *North Star Steel, Texas*, 114 LA 234 (K. Eisenmenger 1999), upheld the discharge of an employee whose urine specimen was adulterated by nitrites, which can prevent the detection of marijuana. Said the arbitrator: "The addition of a masking agent by the employee to his urine sample subverts the purpose of the drug testing program and the Company's ability to maintain a safe work environment for the employee and other employees." *Id.* at 243-44. The discharge of a fork-lift operator was also sustained in *Biolab, Inc.*, 114 LA 279 (D. Brodsky 2000). The arbitrator commented: "The employee works not only with motorized vehicles, but also with dangerous chemicals." *Id.* at 284.[15]

Even if arbitrators feel a discharge too harsh in a given case, they will weigh safety factors in substituting a lesser sanction. Thus, in *Nature's Best*, 114 LA 217 (J. Grabuskie

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[14] Edgar A. Jones, Jr., *The Role of Arbitration in State and National Labor Policy*, in Arbitration and the Public Interest, Proceedings of the 24th Annual Meeting, National Academy of Arbitrators 42, 53 (G. Somers & B. Dennis eds. 1971).

[15] For other examples of abitration decisions during the past decade implicating law and public policy concerning workplace safety, *see Exxon Pipeline Co.*, 109 LA 951 (J. Abercrombie 1997) (DOT standards for alcohol abuse); *Avnet, Inc.*, 107 LA 921 (D. Kadue 1996) (California law on drug rehabilitation); *Rothe Development, Inc.*, 106 LA 97, 99 (B. Baroni 1996) ("Safety considerations ... are of paramount importance when evaluating drug and alcohol possession and use in the workplace"); *Columbia Gas of Pennsylvania*, 102 LA 513 (J. Duff 1994) (DOT regulations regarding drug use applied to gasline employee); *Westinghouse Hanford Co.*, 101 LA 46 (L. Nelson 1993) (Department of Energy regulations regarding alcohol abuse applied to nuclear facility employee).

1999), the operator of a mechanized "picker" in a warehouse was injured and took a pain killer prescribed for another person. He later tested positive for codeine. The arbitrator set aside his discharge but imposed a 30-day suspension, stating: "[W]hile the Grievant's behavior might have been innocent, the fact is, what he did was unlawful and potentially dangerous and ... he must be considered to have been impaired to a degree." *Id.*at 222.

Arbitrators have been expressly advised by two of their most scholarly colleagues to make clear in their opinions that they are taking public policy into account. Dean Roger Abrams and Professor Dennis Nolan counseled: "[T]he arbitrator must strive to write an award that will actually *deter* legal challenges.... To meet this test, more is required in the decision than a basis in the agreement and a result consistent with public policy. The opinion must, in addition, be clear, orderly, reasoned, and complete." [16]

The arbitrator in the present case, as we have previously indicated, was plainly concerned that workplace safety was at stake and carefully factored it into his decision. He declared: "One avoids [drugs] because drugs have a negative impact on job performance, safety and company liability. Drugs and work simply don't mix" (Petition for Certiorari, App. D, p. 28a). He then framed a remedy aimed at ensuring "that the company and union will not be required to use arbitration again for this grievant where drugs are involved" (*ibid.*). That included reinstatement of a prior arbitration award providing for grievant's return to work only after a substance-abuse professional approved by the company had determined the

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[16] Roger I. Abrams & Dennis R. Nolan, *Arbitral Craftsmanship and Competence*, in Arbitration 1988: Emerging Issues for the 1990s, Proceedings of the 41st Annual Meeting, National Academy of Arbitrators 313, 315-16 (G. Gruenberg ed. 1989) (emphasis in the original).

employee had successfully completed a treatment program and was fit to return; a requirement of random drug testing over five years; and mandatory resignation in the event of a positive test for any illegal drug during that period (*id.* at 29a; Petition for Certiorari, App. B, p. 16a).

There are strong, statutorily based countervailing policies to the concern about safety as it affects the finality of the arbitration process. We have spoken repeatedly about the federal labor laws' promotion of arbitration as a "substitute for economic warfare." *Lucas Flour*, *supra*, 369 U.S. at 105. Even more fundamental is the duty to bargain under Section 8(a)(5), (b)(3), and (d) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5), (b)(3), and (d). Safety on the job is a mandatory subject of bargaining.[17] Petitioner would have us pursue the will-o'-the-wisp of a hypothesized "public policy" about safety as a brake on employer commitments, while there is staring us in the face the reality of a well-established statutory mandate cutting the other way. Judge Easterbrook sums it up neatly:

> Even operators of nuclear power plants must bargain with their unions about safety and discipline. It makes no sense to say that the employer must bargain with the union about, say, a proposal for progressive discipline barring discharge for a first offense, and then turn around and invoke "public policy" to allow the firm to discharge an employee for a first offense despite the collective bargaining agreement. The Nuclear Regulatory Commission (NRC) might require discharge

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[17] 1 ABA Section of Labor and Employment Law, The Developing Labor Law: The Board, the Courts, and the National Labor Relations Act 897-99 (P. Hardin ed. 3d ed. 1992); *NLRB v. American Nat'l Can Co.*, 924 F. 2d 518 (4th Cir. 1991), *enforcing* 293 N.L.R.B. 901 (1989); *Hi-Tech Cable Corp.*, 318 N.L.R.B. 280 (1995), *enforced in part*, 128 F.3d 271 (5th Cir. 1997). *Cf. Gateway Coal v. Mine Workers*, 414 U.S. 368 (1974).

> but has not done so. As long as the NRC is silent, the *real* public policy at hand is the one requiring employers to bargain with unions *and to live up to the agreements they reach.*[18]

Finally, if we are to consider public policy beyond the limits of positive law, it is only fair to take account of a legitimate concern of working people and society generally. That is the rehabilitation of the wrongdoer. Recognizing the value of reorienting a person who has misstepped is a hallmark of a humane and caring society.[19] That should be of particular concern in an era all too well acquainted with employees "troubled" by drug and alcohol abuse, and with an increasing resort to "employee assistance programs."[20] The one impartial participant in these proceedings who had a chance to observe and assess the grievant, namely, the arbitrator, could conclude that any safety risk here was outweighed by the likelihood of rehabilitation. That judgment should not be overturned from afar on the basis of "speculation or assumption." *Misco*, *supra*, 484 U.S. at 44.

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[18] Easterbrook, *supra* note 10, at 73 (emphasis in the original). See also Edwards, *supra* note 12, at 23-29.

[19] The classic treatment in the penal context is Francis A. Allen, The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose 80-89 (1981).

[20] *See generally Tia Schneider Denenberg & R. V. Denenberg, Alcohol and Other Drugs: Issues* in Arbitration (1991).

CONCLUSION

For the reasons stated the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

THEODORE J. ST. ANTOINE *
Special Counsel
Hutchins Hall
625 South State Street
Ann Arbor MI 48109-1215
(734) 764-9348

JOHN KAGEL
President, National Academy of Arbitrators
P.O. Box 50787
Palo Alto CA 94303
(650) 325-0389
Counsel for Amicus Curiae, National Academy of Arbitrators

Of Counsel:

DAVID E. FELLER
Boalt Hall
Bancroft at Piedmont
Berkeley CA 94720
(415) 642-0629

* Counsel of Record